(1)

95-1423

No.

Supreme Court, U.S.
FILED
MAR 1 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

Marie E. Cully,

Petitioner,

v.

St. Augustine Manor, et al.,

Respondents,

On Petition For Writ of Certiorari
To The Supreme Court of the State of Ohio

PETITION FOR WRIT OF CERTIORARI

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208 pp

QUESTIONS PRESENTED FOR REVIEW

1. In a Title VII case, is summary judgment inappropriate

(a) Where a continuing course of retaliation is established, with continuing internal complaints of retaliatory discrimination, the last such complaint being made within two months of the employee's discharge, and

(b) Where the employer offers no admissable reason for the discharge

2. Does 28 U.S.C. § 1367 toll the statute of limitations on claims which could not be pursued in a case removed to federal court, without waiving a timely and valid procedural objection to removal jurisdiction.

LIST OF PARTIES

Marie E. Cully, Plaintiff Pro Se

St. Augustine Manor

St. Augustine Manor Corporation

Catholic Charities of Cleveland, Ohio

Catholic Diocese of Cleveland, Ohio

St. Alexis Hospital, whose parent company is Primary Health Care Systems.

St. Alexis Hospital Association, whose parent company is Primary Health Care Systems.

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619 F2d 1292. 11

STATUTES:

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28 USC § 1367(d) 2,14

28 USC §2000e 3(a) 2,12

28 USC § 2000e-5(f) 2,12

The Petitioner, Marie E. Cully, respectfully prays that a writ of certiorari issue to review the order entered on October 4, 1995 by the Supreme Court of the State of Ohio dismissing petitioner's appeal and denying her motion to certify the record of the Court of Appeals of Cuyahoga County, Ohio

OPINIONS BELOW

The Order of the Supreme Court of Ohio denying its review is unreported and is reproduced in the Appendix at Appendix Pg 1. The Journal Entry and Opinion of the Court of Appeals for Cuyahoga County, Ohio is unreported and is reproduced in the Appendix at Appendix Pg. 3. The Opinion and Order of Common Pleas Court of Ohio is unreported and is reproduced in the Appendix at Appendix Pg. 58. The Notice of Right To Sue is reproduced at

Appendix Pg. 78. The Determination of EEOC is reproduced at Appendix Pg. 80.

JURISDICTIONAL STATEMENT

On October 4, 1995, the Supreme Court of the State of Ohio entered an order denying appellate and discretionary review of that court. On December 14, 1995, in Application No. A-511, Justice Stevens extended the time in which to file a petition for writ of certiorari to and including March 1, 1996. Jurisdiction of this Court is sought pursuant to Title 28, USC § 1257.

STATUTES INVOLVED

28 USC § 1367(a) is reproduced in the appendix at Appendix Pg. 84. 28 USC § 1367(d) is reproduced in the Appendix at Appendix Pg. 85. 28 USC §2000e 3(a) is reproduced in the Appendix at Appendix Pg. 85. 28 USC 2000e-5(f) is reproduced in the Appendix at Append. Pg 86.

STATEMENT OF THE CASE

Petitioner worked at Respondent St. Alexis Hospital from 1986-1987. Prior to working there, she had filed EEOC charges of retaliation against Grace Hospital and EEOC charges of wage discrimination on the basis of sex and retaliation against Lutheran Medical Center. During her employment at St. Alexis, she was sexually harassed, and harassed in retaliation for her prior complaints and finally discharged. While at St. Alexis, she was a co-worker with Thomas Dagg, and had asked him to cease using a racial epithet. Thomas Dagg was defensive of his use of the epithet.

After being fired by St. Alexis, plaintiff was hired at St. Augustine Manor in June 1987 and some time later Thomas Dagg was hired to be her supervisor. Thomas Dagg made repeated

unwelcome, unnecessary contact with Petitioner's breasts and otherwise harassed Petitioner, also warning, suspending, and firing her in April 1992

In 1987, Petitioner filed a suit in state court for promissory estoppel against Grace Hospital, amending her complaint to include a cause for promissory estoppel and civil rights deprivation against St. Alexis Hospital. That suit (Cully v. Grace Hospital Supreme Court case no. 94-6373) was then removed to federal court with a defective removal petition. Petitioner filed a timely Motion for Remand, citing the lack of joinder of all served defendants in the removal petition. In about January of 1992, the removed case was assigned to a Magistrate, who dismissed the two non-joined defendants, then dismissed the suit. The suit was still pending when Petitioner was fired from St. Augustine.

Petitioner filed EEOC charges against St. Augustine and within 90 days of receiving her determination and notice of right to sue, filed the instant suit in state court for retaliatory discrimination and sexual harassment discrimination. She also made claims for state law promissory estoppel, breach of implied contract, sexual harassment, intentional infliction of emotional distress and conspiracy. She also made claims against St. Alexis, including an EEOC claim. Petitioner had filed an affidavit of discrimination by mail to the EEOC averring discrimination by St. Alexis (Appendix Pg.s 175-182). The EEOC never made notice of that charge.

In the instant suit, all parties sought summary judgment which was granted to all defendant on all claims. Plaintiff opposed

summary judgment and argued that the causal nexus persisted because her opposition to her previous firing persisted throughout her entire employment at St. Augustine. "In fact during the entirety of her employment at St. Augustine, Plaintiff had a claim pending against St. Alexis, first i n a potentially res judicata unemployment proceeding and later also in a civil rights and promissory estoppel lawsuit" (Plaintiff's Preliminary Response to Defendant St. Augustine Manor's Motion for Summary Judgment, Filed June 13, 1994). Plaintiff repeatedly complained to her superiors at St. Augustine Manor of retaliation for her previous charges and lawsuits (letters attached to affidavit, at Appendix pgs 127, 146, 154 and 166.) Plaintiff referred to these in her Brief of Appellant filed in the Eighth District Court of Appeals, saying "Even if a prima

facie causal nexus is weak between the EEOC charge or suit against St. Alexis, her firing was made near to other complaints in the letters of retaliation by St. Augustine for the earlier complaints. The complaints in the letters themselves are conduct protected by Title VII and provide the time-based causal nexus." (Brief of Appellant filed Sep 26 1994 at pg. 11)

Plaintiff also opposed summary judgment on the grounds of the weakness of her employer's stated reason for firing her. In St. Augustine's Motion for Summary Judgment, the only sworn reference to a reason "fired for misconduct" by a personnel officer who had no first hand knowledge of any facts. The document she refers to in her affidavit states only that some time after Petitioner's treatment, a patient was found poorly positioned. This is

hearsay and the conclusion that Plaintiff was at fault is not logically based on any fact. Plaintiff noted this to the trial court, saying '"Defendant has provided no testimony of affidavits from first-hand knowledge establish that Plaintiff was guilty of the misconduct for which she was fired. Plaintiff's Affidavit specifically refutes this issue of fact, and summary judgment is inappropriate to determine it." (June 13 1994 Preliminary Response) Again on appeal, Plaintiff stated, "St. Augustine has not put forth any admissible evidence showing that they had good reason to believe Plaintiff engaged in any misconduct." (Brief of Appellant at 11)

In opposing the Summary judgment for St..Alexis, plaintiff wrote, " operates to toll the statute of limitations on plaintiff's claims for emotional distress and wrongful discharge from

St. Alexis during the pendency of the prior suit in Federal Court from May 1988 to July 1992."

(Plaintiff's Response to Defendant St. Alexis Hospital's Motion for Summary Judgment, Pg 1)

On appeal, she argued for application of the longer Ohio savings statute, as provided for by U.S.C. Title 28 § 1367.

REASONS FOR GRANTING THE WRIT

In a Title VII case, summary judgment is inappropriate where there is a question of a continuing course of discrimination, and where later internal complaints of retaliation have a close time nexus to discharge. In Horchstadt v. Worchester Foundation for Experimental Biology, 425 F Supp 318, the plaintiff's burden in a Title VII retaliation case was found to be proof that (1) Plaintiff engaged in an activity; (2) Her employers were aware of her protected activity (3) She was subsequently subjected to a negative employment action; and, absent other evidence tending to establish a retaliatory motivation (4) that the negative action followed the protected activity in such a period of time to infer a motive of retaliation. While many courts seem to hold that only a time nexus will meet the test of

causation, others have held that what is needed is a showing of (1) statutorily protected activity (2) an adverse employment action and (3) a causal connection between the two (Womack v. Munson 619 F2d 1292.)

It is not clear why an employer who wishes to retaliate will do so immediately. On the contrary, an employer can maximize the benefit of its retaliation if it can continue it throughout the administrative and judicial resolution of the protected activity. Particularly where the employee is a pro se layperson at law, this can effectively sap her time and energy so that she is diverted from her complaint.

This Court has recognized that discrimination can be a continuing series of actions (Havens Realty Corp. v. Coleman 455 US 363, 102 S. Ct.. 1114.) Other courts have

recognized that a continuing violation will bring an act of discrimination into the limitations period, and the question of continuing violation is one of fact. ; Johnson v. Nyack Hosp. 891 F. Supp 155) Martin v. Nannie and the Newborns, Inc(3 Fd 1410.) In the instant case, there was a course of retaliatory actions, and petitioner filed her charge within the statutory time allowed following her discharge. 28 § 2000e-5 (f) Since retaliation could not usually be continued after her discharge, the discharge was the "permanent" instance of retaliation triggering the running of the limitations period. Additionally, Petitioners internal complaints of retaliation made on February 20, 1992 and March 5, 1992 are protected activities (28 USC §2000e-3(a), establish a close time nexus to her firing on April 29, 1992. Requiring that a plaintiff file charges

for each of the lesser, earlier charges would be inefficient, and would allow an employer to simply wait to fire a complainant in order to avoid liability for retaliation.

Summary judgment is inappropriate in a Title VII case where an employer offers no admissible reason for their adverse action.

The employers burden of going forward bears on the question of discrimination, which is the question both at the outset and conclusion of the case. (St. Mary's Honor Center v. Hicks 113 S. Ct. 2742). However, lower courts differ as to whether insufficiency of an employer's reason can forestall summary judgment without proof of an employer's discriminatory motivation.In Barbour v. Merrill, 48 F3d 1270, the District of Columbia Circuit held that a Motion for Judgment as a Matter of Law was properly denied

because the employer's motive was suspect. However, in Rhodes v. Guilberson Oil Tools 39 F3d 537, the Fifth Circuit held that the fact that an employer's motive was in doubt was not enough to avoid Judgment as a Matter of Law. Certiorari should be granted to resolve this important federal question.

28 U.S.C. § 1367 tolls the statute of limitations on claims which could not be pursued in a case removed to federal court, without waiving a timely and valid procedural objection to removal jurisdiction. Recognizing the problem of delay in federal courts (8 U.S. Code Congressional and Administrative News 6829-6830, Congress passed the Judicial Improvements Act of 1990 (P.L. 101-650) to rectify delays and speed the administration of justice in federal courts. That statute created

subsection (d) of 28 USC § 1367"...to prevent the loss of claims to statutes of limitations where state law might fail to toll the running of the statute of limitation wile a supplemental claim was pending in federal court" (8 U.S. Code Congressional and Administrative News 6878).

This case is within the scope and meaning of that amendment. Plaintiff's state law claims were dismissed by federal court, and the statute does not limit its applications to certain types of dismissals. Furthermore, the application of the statute here serves the purpose of the statute where the removed case remained in federal court for over four years. Plaintiff could not pursue her EEOC claim against St. Alexis by amending her complaint without waving her valid, timely Motion to Remand Brough v. United Steelworkers of America AFL-CIO 437 F2d 748.

Since denial of remand is not subject to interlocutory review, reservation of the state causes of action is fair. Application of res judicata would defeat the purpose of the amendment and is contrary to Ohio law. (Kelly v. Georgia Pacific Corp. 545 NE 2d 1244).

The amendment applies to this case. Where a lawsuit is commenced within the statute of limitations and the statute is later extended, the cause has not been put to repose, and the extended limit applies (Ruggieri v. Warner 7 Swasey Co. 928 F2d 322.)

CONCLUSION

For the foregoing reasons, petitioner respectfully requests that a writ of certiorari issue to review the judgment of the Ohio State Supreme Court, and that this court remand this case for a jury trial on the merits.

Respectfully submitted,

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Petitioner Pro Se

THE SUPREME COURT OF OHIO

1995 TERM

To Wit: October 4, 1995

Marie E. Cully,

Appellant,

v.

St. Augustine Manor, et al.,

Appellees.

Case No. 95-1195

E N T R Y

Upon consideration of the jurisdictional memoranda filed in this case, the Court declines jurisdiction to hear the case and dismisses the appeal as not involving any substantial constitution question.

COSTS:

Docket Fee, Affidavit of Indigency filed

(Cuyahoga County Court of Appeals; No

67601)

(s) [T homas J. Moyerl
THOMAS J. MOYER
Chief Justice

COURT OF APPEALS OF OHIO, EIGHTH DISTRICT

COUNTY OF CUYAHOGA

NO. 67601

MARIE E. CULLY

Plaintiff-appellant

vs.

ST. AUGUSTINE MANOR, et al

Defendant-appellees

JOURNAL ENTRY AND OPINION

DATE OF ANNOUNCEMENT OF DECISION:

APRIL 20 1995

CHARACTER OF PROCEEDING

Civil appeal from Court of Common Pleas

Case No. 260854

JUDGMENT: AFFIRMED

DATE OF JOURNALIZATION: MAY 01 1995

APPEARANCES:

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DONALD C. NUGENT, J.:

This is an appeal from a final judgment of the Cuyahoga County Court of Common Pleas, which granted summary judgment in favor of the

defendants-appellee, St. Augustine Manor, St. Augustine Manor Corporation, Catholic charities of Cleveland, the Catholic Diocese of Cleveland and St. Alexis Hospital Association.

Plaintiff-appellant, Marie E. Cully, raises the following assignments of error for our review:

I. THE COURT ERRED IN NOT HOLDING THAT OHIO REVISED CODE § 2305.19 APPLIES TO THIS SUIT TO EXTEND THE STATUTE OF LIMITATIONS UNTIL ONE YEAR AFTER THE FEDERAL COURT DISMISSAL ON JULY 23, 1993.

II. THE COURT ERRED IN NOT HOLDING THAT *RES JUDICATA* DOES NOT APPLY FROM A PRIOR FEDERAL COURT JUDGMENT ON A CAUSE OF ACTION FOR PROMISSORY ESTOPPEL TO BAR A

SUBSEQUENT SUIT BASED ON 42 USE 2000E ET SEQ. "TITLE VII" BROUGHT IN COMMON PLEAS.

III. THE COURT ERRED IN NOT HOLDING THAT COMMON PLEAS COURT HAS JURISDICTION OVER THIS ACTION TIMELY FILED PURSUANT TO 42 USC 2000E ET SEQ. "TITLE VII."

IV. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ST. AUGUSTINE MANOR WHERE THE EVIDENCE ON FILE SHOWED A CAUSAL CONNECTION BETWEEN PLAINTIFF'S OPPOSITION TO PRACTICES UNLAWFUL UNDER TITLE VII AND THE RETALIATION OF ST. AUGUSTINE MANOR.

V. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO ST. AUTUSTINE

MANOR WHERE REASONABLE MINDS COULD DIFFER AS TO WHETHER PLAINTIFF RELIED ON THE PROMISES IN THE EMPLOYEE HANDBOOK TO HER DETRIMENT.

VI. THE COURT ERRED IN GRANTING SUMMARY JUDGMENT TO CATHOLIC DIOCESE AND CATHOLIC CHARITIES WHERE THERE WAS CONFLICTING EVIDENCE AS TO THEIR CONTROL OVER ST. AUGUSTINE MANOR.

VII. THE COURT ERRED IN REQUIRING PROOF OR PROFESSIONAL TREATMENT OF PLAINTIFF'S MENTAL HARM TO FORESTALL SUMMARY JUDGMENT.

VIII. THE COURT ERRED IN DENYING PLAINTIFF'S PROTECTIVE ORDER AND GRANTING DEFENDANT'S MOTION TO

COMPEL.

IX. THE COURT ERRED IN DENYING PLAINTIFF'S MOTION TO COMPEL AND GRANTING PREMATURE SUMMARY JUDGMENT TO DEFENDANTS ON THE GROUNDS OF INSUFFICIENT EVIDENTIARY SUPPORT OF PLAINTIFF'S CLAIMS.

I.

Appellant initiated the present action through the filing of her complaint against appellees on November 8, 1993. This action arises out of an employment relationship between appellant and St. Alexis Hospital Association from June of 1986 to June of 1987 and between appellant and St. Augustine Manor from June of 1987 to April of 1992. In her complaint, appellant further alleged that ST. Augustine Manor is substantially identical to or

controlled by appellees St. Augustine Manor Corporation, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland.

Appellant's complaint attempts to set forth causes of action against appellees for (1) wrongful discharge in violation of public policy, breach of an implied contract and promissory estoppel; (2) retaliatory discharge; (3) sexual harassment and sexual discrimination; (4) intentional infliction of emotional distress; and (5) conspiracy. All defendants duly answered, denying the substantive allegations of appellant's complaint. Following discovery, the trial court granted summary judgment in favor of each defendant. This timely appeal follows.

II.

Appellant's first and second assignments

of error contest the trial court's decision granting summary judgment in favor of St. Alexis Hospital Association (hereinafter "St. Alexis:). Before the trial court, St. Alexis argued in its motion for summary judgment that appellant's claims were time barred by pertinent provisions of the statute of limitations; to-wit: R.C. 2305.07 and 2305.09. St. Alexis further argued that appellant's claims were barred by the doctrine of *res judicata* and collateral estoppel.

A.

In reviewing a summary judgment, an appellate court conducts a *de novo* review of the trial court's decision. " A court reviewing the granting of a summary judgment must follow the standards set forth in Civ. R. 56 (c) ***." *Aglinsky v. Cleveland Builders Supply Co.* (1990) 68 Ohio App.3d 810, 814. Civ. R. 56(c) provides

that before summary judgment may be granted, it must be determined that:

> (1) no genuine issue as to any material fact remains t be litigated; (2) the moving party is entitled to judgment as a matter of law; and (3) it appears from such evidence that reasonable minds can come to but one conclusion and, reviewing such evidence most strongly in favor of the party against whom the motion for summary judgment is made, that conclusion is adverse to that party. *Temple v. Wean United, Inc.* (1977), 50 Ohio St 2d 317, 327.

In reviewing a motion for summary judgment, the court must construe the evidence and all reasonable inferences drawn therefrom in

a light most favorable to the party opposing the motion. *Morris v. Ohio Cas. Ins. Co.* (1988), 35 Ohio St.3d 45; *Harless v. Willis Day Warehousing* (1978), 54 Ohio St. 2d 64. Because summary judgment represents a short-cut through the normal litigation process by avoiding trial, summary judgment must be awarded with caution, resolving all doubts in favor of the party opposing the motion. *Viock v. Stowe-Woodward Co.* (1983), 13 Ohio App.3d 7.

The burden of establishing that no genuine issues to any material fact remain to be litigated is on the party moving for summary judgment. *Turner v. Turner* (1993), 67 Ohio St. 3d 337, 340; *Fyffe v. Jeno's, Inc.* (1991), 59 Ohio St3d 115, 120. Once a party moves for summary judgment and has supported his or her motion by sufficient and acceptable evidence, the party

opposing the motion has a reciprocal burden to respond by affidavit or as provided in Civ. R. 56 (C), setting forth specific facts explaining that a genuine issue of material fact exists for trial. *Jackson v. Alert Fire & Safety Equip., Inc.* (1991), 58 Ohio St.3d 48, 52; *Mitseff. Wheeler* (1988), 38 Ohio St. 3d 112, 115. A motion for summary judgment forces the nonmoving party to produce evidence on all issues for which that party bears the burden of production at trial. *Wing v. Anchor Media, Ltd. of Texas* (1991), 59 Ohio St. 3d 108, paragraph three of syllabus (Celotex v. Catrett [1986], 477 U.S. 317, approved and followed).

B.

In its motion for summary judgment, St. Alexis argued that appellant's claims are time barred by pertinent provisions of Ohio's statute of limitations. Appellant's first assignment of

error complains that the trial court erred in ruling that her claims were barred by the statute of limitations.

In appellant;'s complaint, she alleged four causes of action against St. Alexis, including sexual harassment, wrongful discharge, conspiracy and intentional infliction of emotional distress. In support of its motion for summary judgment, St. Alexis attached the affidavit of Donald J. Vibbert, formerly the Manager of Pulmonary Disease Services for St. Alexis, who averred that St. Alexis employed appellant between June 16, 1986 and June 22, 1987. Mr. Vibbert further averred that subsequent to appellant's termination, St. Alexis has had no contact with appellant. Appellant does not dispute the dates of her employment with St. Alexis nor does she dispute that she has had no

further contact with St. Alexis since the date of her termination.

St. Alexis argued that appellants claims for sexual harassment, conspiracy and intentional infliction of emotional distress are governed by the four-year statute of limitations contained in R.C. 2305.09 (D). We agree that a claim for intentional infliction of emotional distress is governed by the above statute. Se, *Yeager v. Local Union 20* (1983), 6 Ohio St.3d 369; *Bowling v. Brendamour's, Inc.* (1988), 40 Ohio App. 3d 37. Because St. Alexis last had contact with appellant in June of 1987, appellant's claim for intentional infliction of emotional distress should have been brought by June of 1991. Appellant did not bring the present action until November of 1993. Apellant's claim for intentional infliction of emotional distress is therefore barred by R.C.

2305.09. (D).

Next, we reject St. Alexis's contention that R.C. 2305.09(D) applies to appellant's claim for sexual harassment brought pursuant to 42 USC §2000e, Title VII. 42 USC §2000e-5(F)(1) provides for a ninety-day statute of limitations following receipt of a right to sue or dismissal notice from the Equal Employment Opportunity Commission. The record reveals that appellant was terminated in June of 1987. The record does not reveal when appellant received notice of dismissal from the EEOC; however, appellant did bring an action in federal court in April 27, 1988. That action was dismissed on July 22, 1993. Thus, appellant received notice of dismissal from the EEOC prior to April of 1988. The present action was not filed until November 8, 1993. Thus, appellant's claim for sexual harassment was barred by 42

USC §2000e(f)(1).

Even in construing appellant's sexual harassment claim liberally so as to include an independent state law action pursuant to R.C. 4112.99, the applicable six-year statue of limitations (the longest applicable statute of limitations for a discrimination claim) of R.C. 2305.07 would apply. *Cosgrove v. Williamsburg of Cincinnati Mgt. Co., Inc.* (1994), 70 Ohio St.3d 281, syllabus. Applying R.C. 2305.07 to the instant sexual harassment claim reveals that appellant's claim for sexual harassment under R.C. 4113.99 should have been brought in June of 1993. Instead, appellant's complaint was filed on November 8, 1993. Thus, appellant's claim for sexual harassment, whether based on federal law or state law, is barred by the relevant statutes of limitations.

St. Alexis next contends that appellant's claims for wrongful discharge, breach of implied contract and promissory estoppel are time barred by the six-year statute of limitations contained in R.C. 2305.07. We agree with St. Alexis and conclude that R.C. 2305.07 bars appellant's claim for reach of implied contract see, *Hambleton v. R.G. Barry Corp.* (1984), 12 Ohio Stud 179, 183; *Henry v. Midwest Indus.* (June 11, 1993), Huron App. No. 92-26-CVH, unreported -- and promissory estoppel. *Id.* However, appellant;s claim for wrongful discharge is barred by the four-year statute of limitations found in R.C. 2305.09(D). *Painter v. Graley* (1992), 84 Ohio App. 3d 65, 73, affd. (1994), 70 Ohio St. 3d 377.

Finally, a claim for conspiracy cannot be made subject of a civil action unless something is done which, in the absence of the conspiracy

allegation, would give rise to an independent cause of action. *Katz. Vaninny* (1992), 84 Ohio App.3d 543, 552; *Palmer v. Westmeyer* (1988), 48 Ohio App. 3d 296, 300; and *Stafford v. Greater Cleveland Regional Transit Auth.* (Dec. 23, 2993), Cuyahoga App. Nos. 63663 and 65530, unreported. Thus, the applicable statute of limitations for the underlying cause of action applies to the civil conspiracy charge. As already seen, because all of appellant's underlying causes of action are barred by the relevant statute of limitations, so too is appellant's conspiracy claim.

Appellant, through her first assignment of error, argues that the savings statute of R.C. 2305.19 applies to the instant action to extend the relevant statute of limitations one year after the federal court dismissal on July 23, 1993. Appellant's argument lacks merit.

A review of the record reveals that appellant's federal lawsuit did not "fail otherwise than on the merits." See, *Cero Realty Corp. v. American Mfgrs. Mut. Ins. Co.* ((1960), 171 Ohio St. 82. Appellant's claims against St. Alexis in the federal action were dismissed on summary judgment and were therefore a failure on the merits. Thus, R.C. 2305.19 does not apply, and the trial court properly granted St. Alexis summary judgment pursuant to the relevant statute of limitations.

Appellant's first assignment of error is overruled.

C.

In appellant's second assignment of error, appellant contends that the doctrine of *res judicata* does not apply form the prior federal court judgment on a cause of action for

promissory estoppel to bar a subsequent suit brought in the common pleas court based on 42 USC §2000e, *et seq.* St Alexis argued that the prior federal judgment barred the instant claims. In support of its motion, St. Alexis attached appellant's complaint in federal court, the docket sheet and the memorandum and order dismissing appellant's complaint, including the order of the United States Court of Appeals for the Sixth Circuit affirming the district court's order. It is undisputed that appellant's complaint in federal court arose from the same employment relationship between appellant and St. Alexis of which the present action arises.

In *Joe Horishk's Salvage Pool Sys. of Ohio v. Strongsville* (1993), 91 Ohio App.3d 121, 125-26, this court wrote:

[2} The doctrine of res judicata "is

that 'a final judgment or decree rendered upon the merits, without fraud or collusion , by a court of competent jurisdiction is conclusive of right, questions and facts in issue as to the parties and their privies, and is a complete bar to any subsequent action on the same claim or cause of action between the parties of those in privity with them.'" *Johnson's Island v, Danbury Twp. Bd of Trustees* (1982), 69 Ohio St2d 241,243,23 O.O.3d 243, 244-245, 431 N.E.2d 672, 674, quoting *Norwood v. McDonald* (1943), 142 Ohio St. 299, 27 O.O. 240, 52 N.E.d 67, paragraph one of the syllabus. As the Ohio Supreme Court recently

explained:

> it has long been the law of Ohio that "an existing final judgment or decree between the parties to litigation is conclusive as to all claims which were *or might have been* litigated in a first lawsuit." (Emphasis added.) *Rogers. v. Whitehall* (1985, 25 Ohio St 3d 67, 69, 25 OBR 89, 90, 494 N.E.3d 1387, 1388. "Where a party is called upon to make good his cause of action ***, he must do so by all the proper means within his control, and if he fails in that respect****, he will not

afterward be permitted to deny the correctness of the determination, nor to re-litigate the same matters between the same parties." *Covington& Cincinnati Bridge Co. V. Sargeant* (1875), 27 Ohio St. 233, paragraph one of the syllabus. The doctrine of *res judicata* "encourages reliance on judicial decisions, bars vexatious litigation, and frees the court to resolve other disputes." *Brown v. Felsen* (1979), 442 U.S. 127, 131 [99 S.Ct. 2205, 2209, 60 L.Ed. 3d 767,771]. "Its enforcement is essential to

> the maintenance of social order; for, the aid of judicial tribunals would not be invoked for the vindication of rights of person and property, if *** conclusiveness did not attend the judgments of such tribunals ***." *Southern Pacific Rd. Co. v. United States* (1897), 168, U.S. 1, 49 [18 S Ct. 27-28, 42 L.Ed. 355, 377}. *Natl. Amusements, Inc. V. Springdale* (1990) 53 Ohio St 3d 60,62, 558, N.E.d 1178, 1180.

We further noted that a judgment from a federal court may bar a similar action in state court:

Similarly, in *Lakewood Congregation of Jehovah's Witnesses, Inc. v. Lakewood* (1984), 20 Ohio App.3d 338, 29 OBR 441, 486 N.E.d 194, this court held that "[a] cause of action which has been litigated in federal court determining that a zoning ordinance did not violate the United States Constitution may not thereafter be litigated in state court, in a case involving the same parties and the same facts as those in the federal case, on the grounds that the zoning ordinance violated the Ohio Constitution, based on the doctrine of *res judicata*" *Id.*, syllabus

Id. at 126-127.

trial court properly granted St. Alexis summary judgment on the basis that appellant's complaint is barred by the doctrine of *res judicata*. Thus, the judgment of the United States District Curt is conclusive of the rights, questions and facts in issue between appellant and St. Alexis.

Appellant's second assignment of error is overruled.

III.

A.

Appellant;s third through fifth and seventh assignments of error contest the trial court's decision granting summary judgment to St. Augustine Manor and St. Augustine Manor Corporation. Appellant's sixth assignment of error contests the trial court's decision granting summary judgment to Catholic Charities of Cleveland and the Catholic Diocese of Cleveland.

summary judgment to Catholic Charities of Cleveland and the Catholic Diocese of Cleveland. In their motion for summary judgment, St. Augustine Manor and St. Augustine Manor Corporation (collectively referred to hereinafter as "St. Augustine") argued that appellant was an at-will employee whose employment was terminable at will by either party for any reason not contrary to law. St. Augustine further contended that summary judgment was appropriate on all causes of action as appellant could not set forth a genuine issue of material fact [illegible] of her claims.

Appellant's complaint against St. Augustine, as well as against Catholic Charities of Cleveland and the Catholic Diocese of Cleveland (collectively referred to hereinafter as "Catholic Charities") attempts to set forth the

retaliatory discharge; (3) sexual harassment and sexual discrimination; (4) intentional infliction of emotional distress and (5) conspiracy. Appellant's complaint further alleges that Catholic Charities is liable for St. Augustine's conduct, pursuant to an alleged agent/principal relationship between Catholic Charities and St. Augustine, through the doctrine of *respondeat superior.*

In support of its motion. St. Augustine attached the affidavit of Laurie Palmer, the Assistant Administrator of St. Augustine Manor, who averred that appellant was employed by St. Augustine Manor from June 21, 1987 to April 29, 1992, when she was discharged. At all relevant times, it was averred, appellant was an at-will employee whose employment could be terminated by either party. Ms. Palmer further

averred there were no written or oral representations made to appellant that her employment was anything but at-will. Further, at the time appellant was hired, ST. Augustine was aware that appellant had previously filed a discrimination claim against other employer.s

It was further averred that on April 29, 1992, appellant was terminated for repeated violations of rules of conduct set forth in the Personnel Policies of St. Augustine Manor. A copy of appellant's employee performance report dated April 29, 1992 and pages 14-25 of the Personnel Policies of St. Augustine Manor regarding termination and grievance procedure are attached to St. Augustine's motion.

B.

In appellant's third assignment of error, appellant complains the trail court erred in

granting summary judgment on her claim for sexual harassment and sexual discrimination brought pursuant to 42 USC §2000e *et seq.* et seq. Appellant's seventh assignment of error also partially contends that the trial court erred in requiring proof of professional psychiatric treatment to sustain her claim for sexual harassment.

It is not contested that state courts have concurrent jurisdiction with federal courts to hear and determine claims for gender discrimination brought pursuant to Title VII of the Civil Rights Act of 1964 (42 USC §2000e *et seq.*). *Yellow Freight Systems, Inc. V. Donnelly* (1990), 494 U.S. 820, 108 LEd.d 834, 110 S Ct 1566; *Elek v. Huntington Natl. Bank* (1991), 66 Ohio St.3d 135, 139. indeed, the trial court did not rule, as appellant contends that it lacked

jurisdiction over appellant's claims for sexual harassment and sexual discrimination. Instead, the trial court ruled that appellant failed to produce evidence to raise a genuine issue of material fact concerning her claim for sexual harassment and sexual discrimination.

Whether appellant's claims for sexual harassment and sexual discrimination are brought pursuant to 42 USC §2000e, *et seq.*, R.C. 4112.02 or R.C. 4112.99, the evidentiary standards applicable to a determination regarding a violation of Title VII of the Civil Rights Act of 1964 are applicable. *Little Forest Medical Ctr. of Akron v. Ohio Civ Rights Comm.* (1991), 71 Ohio Stud 607, 609; *Plumbers & Steamfitters Joint Apprenticeship Commt. V. Ohio Civ Rights Comm.* (1981), 66 Ohio ST.d 192, 196.

A plaintiff in a Title VII claim has an initial burden of establishing a prima facie case of sexual discrimination by a preponderance of the evidence. *McDonnell Douglas Corp. v. Green* (1973), 411 U.S. 792, 812. If the plaintiff is successful in carrying that burden, it is presumed that she was discharged because of her sex. The defendant can overcome that presumption by articulating a legitimate, nondiscriminatory reason for the discharge. *Id.* at 802. The defendant's burden to overcome the presumption is not onerous; it merely must raise a genuine issue of 0fact regarding whether it discriminated against the plaintiff. *Texas Dept. of Community Affairs v. Burdine* (1981), 450 U.S. 248, 254. Should the defendant carry its burden, the plaintiff must then "be afforded a fair opportunity to show that [defendant's] stated

reason for [plaintiff's discharge] was in fact pretext." *McDonnell Douglas, supra*, at 804.

In order to sustain a prima facie claim for sexual harassment, appellant must produce evidence raising a genuine issue of fact that: (1) she was a member of a protected class; 92) she was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other verbal or physical conduct of a sexual nature; (3) the harassment complained of was based upon sex; (4) the charged sexual harassment had the effect of unreasonably interfering with the plaintiff's work performance and creating an intimidating, hostile or offensive working environment that affected the psychological well-being of the plaintiff and (5) the existence of *respondeat superior* liability. *Scandinavian Health Spa, Inc. v. Ohio Cia. Rights*

Comm. (1990), 64 Ohio App3d 480,489, approving *Highlander v. K.F.C. Natl. Management Co.* (C.A. 6, 1986), 805 F2d 611; *Henson v. Dundee* (C.A.11, 1982), 682 F2d 897. See, also *Harris v. Forklift Sys., Inc.* (1993),____U.S.____, 114 S Ct. 367 (eliminating requirement that plaintiff's serious psychological well-being be affected).

In opposition to St. Augustine's motion for summary judgment, appellant averred to one instance in which her supervisor, Thomas Dagg, brushed against her breasts. Reference is also made in her deposition to the same incident. However, the remainder of appellant's affidavit states mere conclusory allegations of harassment. Appellant generally avers that her supervisor "engaged in many more incidents of harassment of me than can be adequately

described in this affidavit." Appellant further averred that each time she brought her concerns" to Mr. Dagg's supervisor, Mr. Dagg's supervisor took Mr. Dagg's side.

It is dubious whether the claim of one instance of sexually improper conduct, i.e., Mr. Dagg brushing against appellant's breasts, can satisfy the second element of a prima facie case of sexual harassment. It is even more dubious, and we conclude that appellant has failed to produce substantial evidence to prove, that such conduct has the effect of unreasonably interfering with appellant's work performance and creating an intimidating, hostile or offensive working environment. The workplace must be "permeated with discriminatory intimidation, ridicule and insult *** that is sufficiently severe or pervasive to alter the conditions of the

victim's employment and create an abusive working environment." *Harris, supra*, 114 S. Ct. at 370, citing *Meritor Savings Bank v. Vinson* (1986), 477 U.S. 57, 52. Furthermore:

> "*** mere utterance of an *** epithet which engenders offensive feelings in a (*sic.)* employee,: does not sufficiently affect the conditions of employment to implicate Title VII. Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- is beyond Title VII's purview. Likewise, if the victim does not subjectively perceive the environment to be abusive, the

> conduct has not actually altered the conditions of the victim's employment, and there is no Title VII violation.

Id.

Finally, appellant fails to produce any substantive evidence to support a theory of *respondeat superior.* Generally, in order to support a finding of *respondeat superior,* a plaintiff must show that the employer knew or should have known of the harassment and failed to take remedial action. *Scandinavian Health Spa, Supra; Bandy v. Jackson* (C.A.D.C. 1981), 641 f d 934, at 943. See, also, *Marauder, supra,* at 72, stating, in an action involving continued instances of sexual harassment, "*** absence of notice to an employer does not necessarily insulate that employer from liability ***"; and

Davis v. Black (1991), 70 Ohio Upbeat 359, 366. Appellant's mere allegations that her "concerns were not being addressed fails to substantiate her claim that her employer knew or should have known of the harassment and failed to take remedial action.

Accordingly, appellant has failed to produce evidence to raise a genuine issue of fact on a prima facie case of sexual harassment. Summary judgment on appellant's claim for sexual harassment is, therefore, sustained.

Likewise, appellant has failed to raise a genuine issue of a prima facie case of sexual discrimination. In order to sustain a prima facie claim for sexual discrimination, appellant must produce evidence raising a genuine issue of fact that: (1) she was a member of the statutorily-

protected class; (2) that she was discharged; (3) that she was qualified for the position and (4) that she was replaced by, or that her discharge permitted the retention of, a person not belonging to the protected class. See, *Barker v. Scovill, Inc.* (1983), 6 Ohio St 3d 146, paragraph one of the syllabus; and *Neal v. Hamilton Cty.* (1993), 87 Ohio App. 3d 670. In the present case, appellant has failed to produce any evidence that she was replaced by, or that her discharge permitted the retention of, a person not belonging to the protected class. The trial court, therefore, properly granted St. Augustine's motion for summary judgment on appellant's claim for sexual discrimination.

Appellant's third and seventh assignments of error are therefore overruled.

C.

In appellant's fourth assignment of error, appellant argues that the trial court improperly granted summary judgment to St. Augustine on her claim for wrongful retaliation. Appellant argues that evidence of a causal connection exists that St. Augustine discharged her in retaliation for her having filed a sexual discrimination claim against St. Alexis.

Again, federal law provides the applicable standard for reviewing retaliation claims. In order to support her claim of retaliatory discharge, appellant must establish : (1) that she engaged in protected activity; (2) that she was the subject of adverse employment action and (3) that a causal link existed between the protected activity and the adverse action *Chandler v. Empire Chemical, Inc.* (Dec 21, 1994)), Summit App. No. 16708, unreported; *Jackson v. RKO*

Bottlers of Toledo, Inc. (C.A.6, 1984) 743 F2d 370,375; see, also,*Neal v. Hamilton Cty., supra.* If she successfully establishes a prima facie case, the burden shifts to St. Augustine to articulate a legitimate reason for its action. *Burrus v. United Telephone Co. of Kansas* (C.A. 10, 1982), 683 F2d 339, 343, *certiorari denied* (1982), 459 U.S. 1971. If St. Augustine carries that burden, the burden then shifts back to appellant to show that the articulated reason was merely a pretext. *Id.*

Based on the record before us, we conclude that there is no evidence that St. Augustine's action in discharging appellant followed her activity in pursuing a claim of discrimination against St. Alexis in a sufficiently close period of time to warrant an inference of retaliatory motivation.

It is undisputed that St. Augustine knew

that appellant was pursuing a claim of discrimination against St. Alexis when St. Augustine hired appellant in June of 1987. However, appellant was not discharged form her position with St. Augustine until April of 1992, almost five years later. Without any evidence that St. Augustine;s action in terminating appellant was motivated by appellant's protected activity, appellant's termination does not warrant an inference of wrongful termination. Appellant's mere conclusory statements in her affidavit, in which she alleges that various poor performance reviews and ultimately her discharge from St. Augustine were in retaliation for her sex discrimination claim against St. Alexis, in insufficient to raise a genuine issue of fact. *Manofsky v. Goodyear Tire & Rubber Co.* (1990), 69 Ohio Upbeat 663, 669.

Accordingly, appellant's fourth assignment of error is overruled.

D.

In appellant's fifth assignment of error, appellant claims the trial court erred in granting St. Augustine summary judgment on her claim for promissory estoppel. Appellant contends that reasonable minds could differ as to whether she relied to her detriment on promises contained in the employee handbook.

In Ohio, there is a strong presumption in favor of a contract of employment terminable at will unless the terms of the contract or other circumstances clearly manifest the parties' intention otherwise. *Henkel v. Educational Research Council* (1976), 45 Ohio St. d 249, 255; *Gargasz v. Nordson Corp.* (1991), 68 Ohio App. 3d 149; *Vitanza v. First National Supermarkets,*

Inc. (June 24, 1993), Cuyahoga App. No 62906, unreported, at 21. "unless otherwise agreed, either party to an oral employment-at-will agreement may terminate the employment relationship for any reason which is not contrary to law." *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St.3d 100, paragraph one of the syllabus. A specific term of employment, however, will generally negate the employment-at-will relationship. *See, Henkel, supra*, and *Jones v. East Center for Community Mental Health Inc.* (1984) 19 Ohio Upbeat 19, paragraph one of the syllabus.

An exception to the employment-at-will doctrine is a claim for promissory estoppel. In *Mers, supra*, paragraph three of the syllabus, the Ohio Supreme Court held:

The doctrine of promissory estoppel

is applicable and binding to oral at-will employment greements. The test in such cases is whether the employer should have reasonably expected its representation to be relied upon by its employee and, if so, whether the expected action or forbearance actually resulted and was detrimental to the employee.

Moreover, *Helmick v, Cincinnati Word Processing, Inc.* (1989), 45 Ohio St.3d 1331, paragraph three of the syllabus, the supreme court elaborated on the *Mers* standard for proving a case of promissory estoppel:

> Standing alone, praise with respect to job performance and discussion of future career development will not modify the employment-at-will

relationship. A demonstration of detrimental reliance on specific promises of security can create an exception to the employment-at-will doctrine. (*Mers, [supra]*, approved and followed.)

Later, the supreme court re-affirmed the *Helmick* principle in *Wing v. Anchor Media Ltd. of Texas* (1991), 59 Ohio St. 3d 108, paragraph two of the syllabus, wherein the court held that "[a] promise of future benefits and opportunities without a specific promise of continued employment does not support a promissory estoppel exception to the employment-at-will doctrine." There, the court distinguished promises of job security or continued employment from promises of future opportunities within the company and held the

latter was insufficient to support a claim for promissory estoppel. *Id.* at 110-11. In *Wing,* the supreme court held that a promised opportunity to purchase equity in the company amounted to nothing more than an unenforceable promise of future benefits or opportunities and not a specific promise of continued employment.

this court has further held that the promises or representations allegedly relied upon must be "clear and unambiguous" in their terms in order to support a promissory estoppel claim. *Cohen & Co. v. Messina* (1985), 24 Ohio App.3d 22,26; *Marich v. Ameritrust Co., N.A.* (June 30, 1994), Cuyahoga App. No 66671, unreported, at 6-7; *Corrice v. Cleveland Electric Illuminating Co.* (Feb

24, 1994) Cuyahoga App. No. 64662, unreported. Moreover, an employee cannot rely on "nebulous representations" of continued employment. *Penwell v. Amherst Hosp.* (1992), 84 Ohio Upbeat 016, 20; *Shaw v. Pollock & Co.* (1992), 82 Ohio App.3d 656, 660.

In the present case, appellant fails to produce any evidence of specific promises of job security. The relevant portions of the employee handbook referred to by appellant merely set forth a grievance procedure and a sixty-day probationary period for violations of some, but not all, disciplinary charges prior to termination. Appellant claims neither procedure was followed by St. Augustine in discharging her. Appellant adds that had the proper grievance procedure been followed, she "could have clarified the nature of [disciplinary];charges" against her and

that she relied on these "promises" in refusing " other employment."

A review of the relevant portions of the employee handbook fails to reveal specific promises of job security or continued employment, *Helmick, supra; Wing, supra;* rather, the handbook contains "policies," not promises. In this light, the company's policies are analogous to unenforceable promises of future benefits and do not amount to representations of job security. Moreover, appellant's mere conclusory allegations set forth in her brief and affidavit fail to establish facts sufficient to overcome St. Augustine's motion for summary judgment. *Wing, supra,* paragraph one of the syllabus. Appellant's assertion that had St. Augustine followed proper procedure, she "could have" clarified the charges against her falls

significantly short of establishing that she reasonably relied on representations in the handbook. Additionally, appellant sets forth no facts supporting her claim that she refused other employment.

Appellant's fifth assignment of error is overruled.

D.

In appellant's seventh assignment of error, appellant complains the trial court erred in requiring proof of professional psychological treatment to support her claim for sexual harassment and intentional infliction of emotional distress.

We have already concluded that proof of serious psychological harm is not required to set forth prima facie claim of sexual harassment. *Harris Forklift, supra.* We add, however, that we

record before us.

As for appellant's claim for intentional infliction of emotional distress, we also conclude, as did the trial court, that appellant has failed to raise a genuine issue of material fact of intentional and outrageous conduct on the part of St. Augustine, its agents or employees.

The elements of a claim for intentional infliction of emotional distress were set forth in *Yæger v. Local Union 20* (1983) 6 Ohio St.3d 369, at 374, as follows:

> One who by extreme and outrageous conduct intentionally or recklessly causes serious emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

For conduct to reach the level of "extreme and outrageous," it must go beyond all possible bounds of decency and be regarded as atrocious and utterly intolerable in a civilized community. *Id.* at 375 *Russ v. TRW, Inc.* (1991), 59 Ohio St.3d 42; *Vitanza v. First National Supermarkets, Inc.* (June 24, 1993), Cuyahoga App.No.62906, unreported, at 19. Mere insults, indignities, threats, annoyances, petty oppressions or other trivialities do not amount to outrageous conduct. *Yaeger, supra.* Moreover, the defendant's conduct must be the proximate cause of the plaintiff;s psychic injuries and the resultant emotional distress so serious that a reasonable person, normally constituted, would be unable to cope adequately with the mental distress engendered by the circumstances. *Neal, supra,* at 679;; *Uebeleacker v. Cincon. Sys., Inc.* (1988)

48 Ohio App.3d 268, 275-76.

Appellant sets forth one instance where she claims her supervisor brushed against her breasts but otherwise merely sets forth conclusory allegations of harassment. Again, we cannot consider conclusory allegations of harassment as evidence of intentional infliction of emotional distress. *Wimg, supra;, Neal, supra* Appellant has the burden of setting forth facts sufficient to raise a genuine issue for litigation. To this end, appellant's assertion that her supervisor on one occasion brushed up against her breasts in sufficient to demonstrate conduct which is so outrageous in character and so extreme in degree as to go beyond all possible bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community. Moreover, we cannot conclude that

the resulting emotional distress was so serious that a reasonable person would be unable to cope adequately with the mental distress engendered by the circumstances. The trial court, therefore, properly granted St. Augustine summary judgment on appellant's claim for intentional infliction of emotional distress.

Appellant's seventh assignment of error is overruled.

E.

Appellant next argues, through her sixth assignment of error, that the trial court erred in granting summary judgment in favor of Catholic Charities and the Catholic Diocese. Appellant contends that a genuine issue of fact exists as to the control the Catholic Diocese and Catholic Charities held over St. Augustine. Appellant essentially argues that St. Augustine is

"substantially identical to or controlled by " the Catholic Diocese and Catholic Charities.

For the doctrine of *respondeat superior* to apply, first the employee/agent must, herself, e liable for an act which was committed in the scope of her employment. *Strock v. Pressnell* (1988), 38 Ohio St.3d 207, 217; *Cooper v. Grace Baptist Church of Columbus, Ohio, Inc.* (1992), 81 Ohio App.3d 728. In the present case, we have already concluded that summary judgment was properly granted in St. Augustine's favor on appellant's claims. Consequently liability will not attach to Catholic Charities or the Catholic Diocese pursuant to the doctrine of *respondeat superior.*

Even if St. Augustine were somehow liable on appellant's claims, we would still conclude that summary judgment was properly granted to

Catholic Charities and the Catholic Diocese.

Under the doctrine of *respondeat superior,* "a master is liable in certain cases for the wrongful acts of his servant." Black's Law Dictionary (5 Ed Rev. 1983), 681. In determining whether an agency relationship exists, the Ohio Supreme Court has held that "The relationship of principal and agent or master and servant exists only when one party exercises the right of control over the actions of another, and those actions are directed toward the attainment of an objective which the former seeks." *Hanson v. Kynast* (1985), 24 Ohio St3d 171, 173. Although the requisite degree of control has not been established, *Id.* at 175, "the basic test is whether the employer has the right of control over the manner and means of the work being done." *Duke v. Synmetal Products Co.* (1972), 31 Ohio

App2d 78, 82. To determine this each indicium of control must be viewed in relation to each other and the surrounding circumstances. *Id.*

In support of its motion to dismiss, Catholic Charities and the Catholic Diocese attached the affidavits of August A. Napoli, Jr., President of Catholic Charities, and Father John J. Wright, Legal and Financial Secretary of the Catholic Diocese, who each averred that neither Catholic Charities nor the Catholic Diocese has been involved in the day-to-day business operations of St. Augustine, including decisions concerning the employment of individuals by St. Augustine. Further, it was averred that Catholic Charities and the Catholic Diocese had not exercised operational control or exercised any direction or control over St. Augustine.

In response, appellant averred that her

paychecks were signed by a father not associated with ST. Augustine and that a publication of St. Augustine's indicated some affiliation between St. Augustine and Catholic Charities and the Catholic Diocese. Appellant's evidentiary materials, however, fall woefully short of raising a genuine issue of material fact that Catholic Charities or the Catholic Diocese exercised control or direction over the actions of St. Augustine. As such, the doctrine of *respondeat superior* will not impute vicarious liability from St. Augustine to Catholic Charities or the Catholic Diocese. The trial court, therefore, properly granted summary judgment to Catholic Charities and the Catholic Diocese.

Appellant's sixth assignment of error is, therefore, overruled.

IV.

Appellant's eighth and ninth assignments of error contest the trial court's ruling on discovery issues and are limited to her claims against St. Augustine.

A.

In appellant eighth assignment of error, appellant argues the trial court erred in denying appellant's motion for a protective order and granting St. Augustine's motion to compel appellant to provide the identities and/or authorizations for each psychiatrist, psychologist, other mental health practitioner and other health care providers who had examined or treated appellant.

In ruling on appellant's motion for a protective order, the trial court determined that such discovery was not protected by the physician /patient privilege. R.C. 2317.02

establishes the physician/patient privilege and provides, in pertinent part:

> (B)(1) a physician or a dentist concerning a communication made t him by his patient in that relation or his advice to his patient, except as otherwise provided in this division and division (B)(2) of this section, and except that, if the patient is deemed by section 22151.421 [2151.42.1] of the REvised Code to have waived any testimonial privilege under this division, the physician may be compelled to testify on the same subject. The testimonial privilege under this division does not apply and a physician or dentist may testify or

may be compelled to testify in any of the following circumstances:

(a) In any civil action, in accordance with the discovery provisions of the Rules of Civil Procedure in connection with a civil action, or in connection with a claim under Chapter 4123. of the Revised Code, under any of the following circumstances:

***

(iii) If a medical claim, dental claim, chiropractic claim, or optometric claim, as defined in section 2305.11 of the Revised Code, an action for wrongful death, any other type of civil action, or a claim under Chapter 4123. of the Revised Code is filed by the patient, the personal representative of the estate of the patient if deceased, or his guardian or other legal representative.

It is well settled that upon the filing of a civil action, a plaintiff waives the physician/patient privilege with respect to physical or mental conditions relevant to the civil proceeding. See, *In re Miller* (1992), 63 Ohio St.3d 99; *Calihan v. Fullen* (1992), 78 Ohio App.3d 266; *Colling v. Franklin Cty. Children Serv.* (1991), 79 Ohio App.3d 736; *Hayes v. Cleveland Pneumatic Co.* (1994), 92 Ohio App.3d 35. In the present case, appellant's physical and psychological conditions are undenably relevant to her claim that she suffered severe emotional distress as a result of the sexual harassment, sexual discrimination and intentional infliction of emotional distress allegedly inflicted upon her by the defendants herein. The trial court, therefore, properly granted St. Augustine;s motion to compel discovery.

Appellant's eighth assignment of error is accordingly overruled.

B.

In appellant's final assignment of error, appellant complains the trial court erred in denying her motion to compel St. Augustine to produce various documents related to phone calls to and from St. Augustine and to answer interrogatories directed to St. Augustine's employees concerning their observations of appellant's misconduct.

The trial court exercises broad discretion over the breadth and scope of discovery. Cia.R. 27; *State, ex rel. Grandview Hosp & Medical Ctr. v. Gorman* (1990), 51 Ohio Stud 94. A review of appellant's motion to compel reveals that appellant largely sought information which was irrelevant; *i.e.*, documents related to phone calls

to and from St. Augustine, or information from non-party witnesses in the form of interrogatories which were designed to take the place of depositions. *Penn Central Transportation Co. V. Armco Steel Corp.* (1971), 27 Ohio Misc 76. Appellant's motion to compel was, therefore properly overruled.

Appellant's final assignment of error is overruled.

Judgment affirmed.

It is ordered that appellees recover of appellant their cost herein taxed.

The Court finds there were reasonable grounds for this appeal.

It is ordered that special mandate issue out of this Court directing the Cuyahoga County Court of Common Pleas to carry this judgment into execution.

A certified copy of this entry shall constitute the mandate pursuant to Rule 27 of the Rules of Appellate Procedure.

RECEIVED FOR FILING

APR 20 1995

GERALD E. FUERST, CLERK

BY CMJ DEP.

JAMES M. PORTER, J.

TERRENCE O' DONNELL, J. CONCUR

[s] Donald C. Nugent

PRESIDING JUDGE DONALD C. NUGENT

JOURNALIZED MAY 1 1995

GERALD E. FUERST,Clerk of Courts

By cmj Deputy

N.B. This entry is made pursuant to the third sentence of Rule 22(d), Ohio Rules of Appellate Procedure. This is an announcement of decision (see Rule 26). Ten (10) days from the date

hereof, this document will become the judgment and order of the court and time period for review will begin to run. VOL 0378 PG 0552

IN THE COURT OF COMMON PLEAS

CASE NO. 260854

STATE OF OHIO

CUYAHOGA COUNTY

MARIE CULLY, Plaintiff

vs.

ST. AUGUSTINE MANOR, et al, Defendants

OPINION AND ORDER

KATHLEEN ANN SUTULA, J.:

This action comes before this curt on defendant St. Alexis Hospital Association's motion for summary judgment and plaintiff's response, and defendants St. Augustine Manor's and St. Augustine Manor Corporations's motion for summary judgment and plaintiff's preliminary response.

Plaintiff Marie Cully brings this action

against defendants St. Augustine Manor, Catholic Charities of Cleveland, The Catholic Diocese of Cleveland, St. Augustine Manor Corporation, and St. Alexis Hospital, alleging wrongful discharge, intentional infliction of emotion distress, retaliatory discharge, sexual harassment and conspiracy. Defendants Catholic Charities of Cleveland and The Catholic Diocese of Cleveland have been dismissed from this action, as they neither employed plaintiff, nor had control over any of her employers.

Plaintiff had been employed by defendant St. Alexis Hospital from June 16, 1986 until her discharge in June, 1987. Plaintiff had been employed by defendant St. Augustine Manor from June 1987 until her discharge on April 29, 1992. Plaintiff filed charges with the EEOC alleging sex and age discrimination. These

claims were denied on August 9, 1993.

Defendant St. Alexis Hospital moves for summary judgment on the grounds that claims are barred by the statues of limitations as well as the doctrine of *res judicata*. Revised Code §2305.07 provides a six-year statute of limitations for the claim of wrongful discharge, R.C. §2305.09(D) provides a four-year statute of limitations as to plaintiff's other claims. Plaintiff's claims against St. Alexis arose, at the latest, on her last day of employment with ST. Alexis, June 22, 1987. The within action was brought November, 1993. Therefore, plaintiff's claims are barred by the relevant statutes.

Further, plaintiff's claims are barred under the doctrine of *res judicata*. Plaintiff has previously filed an action against St. Alexis, alleging wrongful discharge, among other claims.

The doctrine of *res judicata* bars the bringing of an action as to claims that were actually litigated as well as those claims which could have properly been litigated. *Jackson v. Lou Cohen, Inc.* (1992), 84 Ohio App.3d 693, 696. Since plaintiff has previously raised allegations of wrongful discharge, her claims in this action are barred by the doctrine of *res judicata;* as they were either raised, or could have been raised, in the prior action.

Defendant St. Alexis Hospital's motion for summary judgment is granted.

Defendants St. Augustine Manor and St. Augustine Manor Corporation move for summary judgment on the grounds that plaintiff has not put forth sufficient proof to indicate that a genuine issue of material fact exists as to any of plaintiff's claims. A motion for summary

judgment forces the nonmoving party to produce evidence on any issue for which that party bears the burden of production at trial. *Wing v. Anchor Media* (1991), 59 Ohio St.3d 108, 111. The party must produce evidence to demonstrate that na issue of fact exists. The evidence must produce a "sufficient disagreement to require submission to a jury" (citation omitted) *Turner v. Turner v. Turner (1993),* 67 Ohio St. 3d 337,340.

Ohio is an at-will employment state. An employee may be discharged for any reason or for no reason at all not contrary to law. *Mers v. Dispatch Printing Co.* (1985), 19 Ohio St. 3d 100, 103. Plaintiff has failed to set forth sufficient evidence to indicate that she was not an employee at-will or that her discharge fell into an exception to the at-will employment doctrine so that her discharge would have been unlawful.

The exceptions to at-will employment are implied contract, promissory estoppel and public policy exception. *Mers. supra.* The burden of proof is on the employee to show that he is not an at-will employee or that his discharge was contrary to law. *Mason v. United States Fid. & Guar. Co.* (1990), 69 Ohio App.3d 309, 315. Plaintiff has produced no evidence of any written or oral promises of continued employment which may indicate an implied contract or promissory estoppel. *Id.* at 316.

Plaintiff also alleges that her discharge was in retaliation for her filing charges with the EEOC against her former employers, and thus fell into the public policy exception. To establish a *prima facie* case of wrongful discharge, a plaintiff must show: 1) her participation in a protected activity; 2) the employer knew of such

participation; and 3) the alleged retaliatory action followed the participation so closely in time as to permit an inference of retaliation. *Neal v. Hamilton Cty.* (1993), 87 Ohio App.3d 670. Plaintiff alleges in this action, that defendants were aware of plaintiff's prior charges of wage discrimination (Complaint paragraph 2). She claims defendant St. Augustine Manor retaliated against plaintiff for her pursuit of the EEOC charges (Complaint paragraph 15). However, plaintiff filed her EEOC charges in 1987, and was discharged by defendant ST. Augustine in 1992. Thus, she cannot establish the requisite nearness in time to withstand summary judgment as to her claim of retaliatory discharge.

Plaintiff further alleges that defendant St. Augustine is liable for the intentional infliction of emotional distress. Intentional infliction of

emotional distress requires that one, by extreme and outrageous conduct, intentionally or recklessly cause severe emotional distress. *Yeager v. Local Union 20* (1983), 6 Ohio St. 3d 369, 374. Yet liability does not extend to "mere insults, indignities, threats, annoyances, petty oppressions or other trivialities" (citation omitted) *Id.* at 375. Plaintiff has not alleged any conduct y defendant that reaches a level sufficient to demonstrate outrageous conduct. Further, plaintiff cannot substantiate her allegations of severe emotional distress as she has not sought any type of professional therapy or counseling at all.

Plaintiff also brings charges of sexual harassment against defendants. The exclusive remedy for pure employment discrimination claims is R.C.§4112.02(A). *Davis v. Black* (1991),

70 Ohio App.3d 159. No Ohio court has yet established what constitutes a common law case of sexual harassment. However, under Title VII, the commission must show: 1) the employee was a member of a protected class; 2) the employee was subjected to unwelcome sexual harassment in the form of sexual advances, requests for sexual favors or other conduct of a sexual nature; 3) the harassment was based on sex; 4) the harassment unreasonably interfered with the plaintiff's work performance and created an intimidating, hostile work environment that seriously affected the well-being of plaintiff; and, 50 the existence of *respondeat superior* liability. *Scandinavian Health Spa, Inc. v. Ohio Civil Rights Comm.* (1990), 64 Ohio App.3d 480, 489. Plaintiff has not set forth any facts to establish that her work environment was so negatively

affected as to validate a claim of sexual harassment.

Finally, plaintiff alleges conspiracy. However, she has produced no facts to substantiate her belief that a conspiracy exists. As no proof of a conspiracy has been offered, plaintiff clearly cannot set forth any evidence that creates an issue of material fact as to the existence of a conspiracy.

Defendants St. Augustine Manor's and St. Augustine Manor Corporation's motion for summary judgment is granted.

IT IS SO ORDERED.

[s] KA Sutula

KATHLEEN ANN SUTULA, JUDGE

Date: July 6, 1994

Received for Filing

Jul 07 1994

By[s] L.Guffin Dep.

Equal Employment Opportunity Commission

NOTICE OF RIGHT TO SUE

(Dismissal)

To:MARIE E. CULLY

6917 Detroit Avenue, Apt. #2

Cleveland, Ohio 44102

From: UNITED STATES GOVERNMENT

EQUAL EMPLOYMENT OPPORTUNITY

COMMISSION

1375 EUCLID AVENUE, ROOM 600

CLEVELAND, OHIO 44115

Charge Number 220921718

EEOC Representative: C. Larry Watson, Regional

Attorney

Telephone Number 216/522-7456

(See the additional information attached to this

form)

TO THE PERSON AGGRIEVED: This is you NOTICE OF RIGHT TO SUE. It is issued because the Commission has dismissed your charge. Your charge was dismissed for the following reason: _X_ No jurisdiction for the following reason, and therefore the Commission has no authority to investigate your charge further.

_X_ Other (briefly state) No employer-employee relationship.

The issuance of this NOTICE OF RIGHT TO SUE terminates the Commission's investigation of your charge. If you want to pursue your charge further, you have the right to sue the respondent(s) named in your charge further, you have the right to sue the respondent (s) named in your charge in United States District Court. IF YOU DECIDE TO SUE, YOU MUST DO SO WITHIN 90 DAYS FROM THE RECEIPT OF THIS NOTICE OF

RIGHT TO SUE: OTHERWISE YOUR RIGHT TO SUE IS LOST.

Date Aug 6 1993

On Behalf of the Commission

[s] Susan L. McDuffie,

Susan L. McDuffie District Director

CATHOLIC CHARITIES OF CLEVELAND

U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

Cleveland District Office

Charge No.: 220921713

Marie E. Cully

6917 Detroit Avenue, Apt. #2

Cleveland, Ohio 44102 Charging Party

St. Augustine Manor

7801 Detroit Avenue

Cleveland, Ohio 44102 Respondent

DETERMINATION

Under the authority vested in me by the Commission, I issue the following determination as to the merits of the above cited charge filed under the Age Discrimination in Employment Act (ADEA), and Title VII of the Civil Rights Act of 1964, as amended.

All requirements for coverage have been met.

Charging Party alleged that she was discriminated against in violation of the ADEA and Title VII, by being disciplined and discharged due to her age, 46, and in retaliation for engaging in activity protected by Title VII.

Respondent denies the allegation.

The analysis of the information contained in this investigative record reveals that Charging Party was hired as a respiratory therapist on June 29, 1987. On her employment application, Charging

Party stated that she left three other employers due to EEOC complaints. Although Respondent was aware of Charging party's protected activity from the onset of her employ, such knowledge is not sufficient to establish a violation of Section 704 (a). A causal connection must be established between the protected activity and the alleged harm. This causal connection can not established and therefore there is no evidence that Respondent retaliated against Charging Party for engaging in protected activity while in the employ of others. There is no evidence also that any younger employees received more favorable treatment than the Charging Party under similar circumstances. Based on the foregoing, I have determined that the evidence obtained during the investigation does not establish a violation of the statutes.

This determination and dismissal concludes the processing of this charge. This letter will be the only notice of dismissal and the only notice of the Charging Party's right to sue sent by the Commission. Following this dismissal, the Charging Party may only pursue this matter by filing suit against the respondent(s) named in the charge within 90 days of receipt of this letter. Otherwise, the Charging Party's right to sue will be lost.

If the charge was filed within 300 days of the alleged discrimination, Charging Party may sue under the ADEA for recovery of backpay, and equal amount as liquidated damages, appropriate make-whole or injunctive relief, and attorneys fees and court costs.

Date Aug 6 1993

On Behalf of the Commission:

/s/ Susan L. McDuffie

Susan L. McDuffie

District Director.

28 USC § 1367(a)

Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article II of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

28 USC § 1367 (d)

The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

28 § 2000e-3(a)

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any

individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this title, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this title.

28 § 2000e-5 (f)

(a) If within thirty days after a charge is filed with the Commission or within thirty days after a charge is filed with the Commission or within thirty days after expiration of any period of reference under subsection (c) or (d), the Commission has been unable to secure from the respondent a conciliation agreement acceptable to the Commission, the Commission may bring a civil action against any respondent not a

government, governmental agency, or political subdivision named in the charge. In the case of a respondent which is a government, governmental agency, or political subdivision, if the Commission has been unable to secure form the respondent a conciliation agreement acceptable to the Commission, the Commission shall take no further action and shall refer the case to the Attorney General who may bring a civil action against respondent in the appropriate United States district court. The person or persons aggrieved shall have the right to intervene in a civil action brought by the Commission or the Attorney General in a case involving a government, governmental agency, or political subdivision. If a charge filed with the Commission pursuant to subsection (b) is dismissed by the Commission or if within one

hundred and eighty days from the filing of such charge or the expiration of any period of reference under subsection (c) or (d), whichever is late, the commission has not filed a civil action under this section or the Attorney General has not filed a civil action in a case involving a government, governmental agency, or political subdivision, or the Commission has not entered into a conciliation agreement to which the person aggrieved is a party, the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, shall so notify the person aggrieved and within ninety days after the giving of such notice a civil action may be brought against the respondent named in the charge (A) by the person claiming to be aggrieved or (b) if such charge was filed by a member of the

Commission, by any person whom the charge alleges was aggrieved by the alleged unlawful employment practice. Upon application by the complainant and in such circumstances as the court may deem just, the court may appoint an attorney for such complainant and may authorize the commencement of the action without the payment of fees, costs or security. Upon timely application, the court may, in its discretion, permit the Commission, or the Attorney General in a case involving a government, governmental agency, or political subdivision, to intervene in such civil action upon certification that the case is of general public importance. Upon request, the court may, in its discretion, stay further proceedings for not more than sixty days pending the termination of State of local proceedings described in subsections (c) or (d) of

this section or further efforts of the Commission to obtain voluntary compliance.

STATE OF OHIO)
) AFFIDAVIT
COUNTY OF CUYAHOGA)

Affiant, being first duly sworn deposes and states the following:

1. I, Marie E. Cully, am Plaintiff Pro Se in case No. 260854, Cully v. St. Augustine Manor, et al., pending in Cuyahoga County Court of Common Pleas of Ohio. This affidavit is prepared in support of my Plaintiff's Response to Defendant St. Alexis Hospital's Motion for Summary Judgment.

2. I was employed by St. Alexis Hospital in June of 1986. At that time I had pending in Common Pleas a suit for wrongful discharge from Lutheran Medical Center. I was also pursuing an EEOC Charge of retaliatory discrimination against Grace Hospital and an appeal of my suit against

Lutheran Medical Center for wage discrimination on the basis of sex and retaliatory discharge.

3. Sometime in late November of 1985, I was sexually harassed by an emergency room Doctor, Dr. Bradt, at St. Alexis Hospital. he reached out and passed the back of his hand over my breasts as he was complaining that having to ask my department for equipment was "a pain in the ass."

4. I was so upset by the doctor's actions described above that I could not initially speak to him, but I later complained to him privately about his harassment, explaining that I was single and did not have any ordinary marital touching of my breasts.

5. I did not report Dr. Bradt's harassment directly to my supervisors but I complained of it to a co-worker. Dr. Bradt sent a letter denying

the harassment to Annette Bendes, a St. Alexis personnel officer, a copy of which is attached as Exhibit 1 to this affidavit. I had no knowledge that he communicated with Annette Bendes on the matter until February 17, 1987.

6. Following Dr. Bradt's harassment, I was harassed by other doctors in St. Alexis Hospital's Emergency Room.. In one incident, I was directed to draw a blood specimen from a patient whose bed had been placed very near a wall. While I was in the process of obtaining the specimen a doctor pushed his way behind me ostensibly to obtain ice from a refrigerator for his beverage. he pushed in such a way that I could clearly feel his penis rubbing against me.

7. After Dr. Bradt's harassment, my supervisor Donald J. Vibbert wrote that I had "undressed in front of an open window" and entered a

reprimand, attached as Exhibit 2 to this affidavit, on my record Donald J. Vibbert and Gene Karpowicz, his assistant both described my actions as lewd behavior.

8. After Donald Vibbert wrote that I had "undressed in front of an open window," I asked him to change his statement and said it was libelous. I had only removed a turtleneck under my blouse then quickly slipped my blouse back on with my back turned to the only other employee present, a female. The window view in question was blocked by an internal blind, which was removed after I was fired.

9. After I asked Donald Vibbert to change his libelous statement, I was ordered to the office of Annette Bendes on February 17, 1987. Annette Bendes then told me she believed I had a sexual problem and required me to seek counseling for

it or be fired.

10. During my meeting with Annette Bendes on February 17, 1987, Annette Bendes also told me that Dr. Bradt had reported to her that I had accused him of sexual harassment. Donald Vibbert was also present at this meeting and stated that since he believed my behavior was lewd, he believed I had o grounds to complain of sexual harassment. Annette Bendes' memorandum regarding this meeting is attached to this affidavit as Exhibit 3

11. St. Alexis Hospital's sexual harassment, allegations of sexual misconduct and sexual perversion caused me to feel helplessness, despair, and self-loathing.

12. After my meeting with Annette Bendes on February 17, 1987 and on that day, Gene Karpowicz directed me to administer a

medicated treatment to a patient on whom it was not ordered. I had to hurry to complete treatments because I was delayed by the meeting with Annette Bendes. Gene Karpowicz stated that he had placed the equipment for the treatment in the patient's room and I did find the assembled equipment for a breathing treatment in the wrong patients room he directed me to.

13. After starting the treatment on the wrong patient as directed, I discovered there was no order for it on the patient's chart, and stopped the treatment. The patient later deteriorated and it was reported that the hospital was seeking relatives who might be in Poland, for information about any advance directives. On hearing this report in my presence, Gene Karpowicz joked that the hospital should send him, to Poland and that he would discover that he, Gene Karpowicz,

was the patient's next of kin and would inherit from him.

14. Based on Gene Karpowicz actions and the actions of other persons, I believed St. Alexis Hospital was freely willing to harm patients as a way of imputing misconduct to me. I was shocked and horrified at this and felt guilt for the mistake I was directed to make and fear for my patients health and safety.

15. Based on my fears for my patients, I increased my efforts to give good and conscientious car to my patients. On March 7, 1987, Theresa Grabski, R.N., asked me to bring a large "H" tank of oxygen to a ventilator patient who wished to sit up in the hall. This patient was lively, charming and determined to recover, and I wanted very much to assist her.

16. I asked my co-worker Ihor Kwit, if he knew

of the location of an "H" tank and he replied that portable oxygen was a luxury the patient could not afford. I did not want to pressure Ihor Kwit because he had previously pushed me into a wall. I reported his remarks to Theresa Grabski, and suggested that the smaller "E" tank which was in clear view be used. Theresa Grabski vehemently refused to consider the smaller tank and said "you guys just don't want to get a tank."

17. Because of my crying on March 7, 1987, Annette Bendes required me to take a 90-day leave of absence during which I would not be allowed to come to St. Alexis. She also stated that my position would not be held for me to return to, contrary to St. Alexis' policy.

19. Towards the end of the 90-day Leave of Absence period, I obtained an MD's statement that I was able to return to work and sent it to St.

Alexis by certified mail on June 6, 1987. St. Alexis Hospital had reserved the right to have their own doctor examine me prior to my return but did not choose to exercise its right.

20. St. Alexis Hospital did not allow me to return to work and fired me on June 22, 1987. I reported that I was fired to the Ohio Bureau of Employment Services.

21. While I worked at St. Alexis Hospital I could not keep from objecting once politely to the repeated use of "God-damn" and repeated reference to a patient as "that little nigger" made by my co-worker Thomas Dagg while he was giving report. When I objected Thomas Dagg defended his use of the racial epithet. Gene Karpowicz, who was made my assistant supervisor at St. Alexis, also regularly used this epithet.

22. Within one week after I was fired from St. Alexis I was hired at St. Augustine Manor. I continued to report to unemployment since I was not initially working full-time. I was claiming benefits form my being fired from St. Alexis without just cause.

23. In the week ending September 26, 1987, I did not work one scheduled day due to an injury to my left knee. As a result, my wages for that week were lower than my unemployment weekly benefit amount of $147.

24. St. Augustine Manor falsely reported to the Ohio Bureau of Employment services that my wages for the week ending September 16, 1987 were greater than $147.

25. Ohio Bureau of Employment Services never issued a decision on my claim for benefits form being fired from St. Alexis in June of 1987,

although they recently paid benefits for the Leave of Absence that preceded that firing.

16. I filed suit against St. Alexis in April of 1988 by an amended complaint filed in Cuyahoga County Common Pleas Court.

27. After April of 1988, I began receiving written reports alleging misconduct from St. Augustine Manor.

28. In May of 1988, my lawsuit against St. Alexis was removed to federal court. Within 30 days of removal, I sought a remand because not all defendants had joined in the removal petition.

29. In 1989, Thomas Dagg, identified at 21. of the Affidavit was made my supervisor at St. Augustine Manor. He began to produce written reports alleging my misconduct at a greatly increased rate.

30. Thomas Dagg often gave me conflicting

notice or no notice of what rules and procedures I was expected to follow. He told me to take the rest of the day off if I was dismissed form jury duty early, contrary to St. Augustine's published policy, citing "a new law."

31. Thomas Dagg made repeated unnecessary, deliberate and harassing contact with my breasts while supervising me at St. Augustine Manor.

32. Thomas Dagg did not produce a manual for use of a ventilator prior to using a new ventilator on a patient. I had to make a written request for the manual to Thomas Dagg's supervisor, Mary Sooner. That written request is reproduced at paragraph 6 of Exhibit 4 attached to this Affidavit. I had heard reports that its ventilator model had on more than one occasion completely ceased working without alarming. I received a copy of the manual after making my written

request and before the ventilator stopped completely only sounding an auxiliary alarm I had insisted on, while I was working with the patient using the ventilator.

33. Thomas Dagg insisted that I comply with his directions to allow a large air leak in the tracheostomy tube cuff of a patient. I complained to his supervisor and to the executive director, who wrote that he had not read the pertinent portions of my complaint. I then wrote the executive director and asked him to read my previous report. After I asked on about March 6, 1992, that the executive director to read my previous report, the patient was transferred to a hospital,where she died. My letter complaining of the danger are reproduced as Exhibit 5 at paragraph 4 and Exhibit 6 at paragraph 4 of this affidavit. My note to the

executive director, David Martin, which was added onto a letter is reproduced as Exhibit 7 attached to this Affidavit.

34. In February of 1992, in my suit against St. Alexis, I was required to file a status report. After I had requested an extension of time to do so, I was scheduled to actively begin supervisory duties by Thomas Dagg. Thomas Dagg told me I would be required to carry a beeper and might have to come in to work at any time as part of these duties.

35. I asked Thomas Dagg and St. Augustine Manor to enforce ORC § 4761.05(d), requiring that persons who practice identify their authority to practice by a designation worn on their person, because I was prohibited on pain of possibly loosing my Ohio Respiratory Care Practitioner License, from supervising

unauthorized persons according to OAC ¶ 4761-10-01(j). After I made my request by express mail, I was told I would not be performing supervisory duties. Exhibit 8 attached at paragraphs 3 and 8 is my written request.

36. St. Augustine Manor fired me on April 29, 1992 using Thomas Dagg's reports of alleged misconduct as a pretext to justify firing me.

37. On January 9, 1989, I sprained my right knee. Following that I worked before it had healed because of St. Augustine Manor's previous written criticism of me alleging poor attendance. My right knee continues to be weak, have pain and causes and irregular gait.

18. At. St. Augustine Manor, I was asked to initial records used for billing insurers showing that work was done when I knew it was not done. One of my supervisors, Melissa Craven told me

when I declined that it was not fair that we would loose a whole month's payment if only one treatment was not done. I heard other employees ask if treatments had in fact been done because they could not tell from the records. I also heard other employees say that "they just want you to sign the Kardexes." I suspected that billing records were routinely falsified. In order to complete all the work I initialled as done, I had to often work through my breaks and work overtime. I was then criticized for not working fast enough by Thomas Dagg.

39. St. Augustine Manors actions and the actions of its supervisors and employees caused me intense fear, anxiety, self-hatred, depression and feelings of wishing to be dead.

40. Attached as exhibit 9 is the original receipt

for registered mail and return receipt for my affidavit of discrimination by St. Alexis Hospital mailed to the EEOC.

41. Attached as Exhibit 10 is a copy of my affidavit of discrimination by St. Alexis Hospital mail to the EEOC.

FURTHER AFFIANT SAYETH NAUGHT

[s] Marie E. Cully
Marie E. Cully

SWORN TO AND SUBSCRIBED BEFORE ME THIS 29TH day of April 1994

[s] Nelli Johnson
Notary Public

NELLI JOHNSON, Attorney
NOTARY PUBLIC - STATE OF OHIO
My commission has no expiration date.
Section 147.03 R.C.

December 1, 1986

Ms. Annette Bendes

Assistant Director of Personnel

5163 Broadway

Cleveland, Ohio

Dear Ms. Bendes,

Thank you for our phone conversation of November 18. This letter continues that conversation in documenting difficulties working with Ms Culley of the Department of Respiratory Therapy.

On November 27, Ms. Culley was summonded to the Emergency Department for care of a croupy child. After 10-15 minutes, she arrived. I told her I knew she was busy with other tasks. I told her patient care delays were a pain, especially

when caused by want of equipment which the E.D. could apply without respiratory therapy assistance. I asked her help in obtaining nebulizer tubing for the E.D. She agreed to help. Ms. Culley returned later to the E.D. and stated to me, "you brushed my breast. I am a single lady and if someone brushes my breast, I want it to be someone I know well." I replied, "Where did this occur?" Then, "Thank you for bringing this to my attention." We exchanged no further words.

I interpret Ms. Culley's statement to be a self-declaration as victim of sexual infraction. Ms. Bendes, I believe sexual misconduct is serious. I believe allegations of misconduct are also serious. Should Ms. Culley pursue this matter with me, or should other staff find difficulty interacting with Ms. Culley, your office could best help achieve satisfactory solutions.

Thank you for your willingness to address these concerns. The difficulties of working in a service-oriented profession are legion. If I may offer additional information, please feel free to call.

Respectfully yours,

[s] David A. Bradt, M.D.

Emergency Department

DAB:sam

Meeting held on 2/17/87 at 3:00 P.M. in Personnel Office.

Present: Don Vibbert, Technical Director, Respiratory Service, Marie Cully, Respiratory Therapist and Annette Bendes, Director of Personnel

The purpose of the meeting was to inform Ms. Cully of the Hospital's concern about her inappropriate behavior and to suggest psychological counseling.

I began the meeting by telling Cully of my concerns about the nature of the written material she has issued within the past few days and what seemed to me to be an abnormal frequency of sexual inferences. Cully said her written material was her means of defense in response to Vibbert

stating she was a "lewd woman." After questioning her abut whether he indeed said this, she replied that he had not, but the way in which the counseling was worded "implied that to the whole world."

Other than a cynical laugh during serious conversation, Cully never showed any emotion.

She stated that unless we published undressing in front of a window as unacceptable she couldn't be expected to know this.

She stated at one point that during the employment interview I told her I was threatened by her admission that she had a OCRC charge against Lutheran and I offered her the Tech's position at St. Alexis for that reason.

She defended her actions at all times and said she has heard her supervisor, Gene Karpowicz use the word "nigger," (she spelled it out) Which

is worse than anything she has ever done. At one point I said "You're damn right" to her and she said "What did you say?' My response was "You heard me right."

The meeting ended with my telling her the bottom line is that her behavior is not acceptable at St. Alexis Hospital, that in my opinion I believe counselling is in order and that I expect to hear from her within the next few days to give me her decision.

At one point Cully said that even with our insurance coverage she might not be able to afford to pay for treatment and would have to quit her job.

She wanted me to put everything in writing on the spot. I refused.

/s/ Annette Bendes
Annette Bendes
Director
Personnel

St. Alexis Hospital

Cleveland, Ohio

Disciplinary Action

TO: EMPLOYEE MARIE CULLY, RRT

POSITION REG. THERAPIST

FROM: NAME OF SERVICE PULMONARY DISEASE SVCS.

DATE OF COUNSELLING 2/13/87

I. This is to inform you that your recent behavior does not meet hospital standards. You are charged with... (Include date of incident and Category No. as defined by Hospital Policy)

ON 2/12/87 THE ABOVE EMPLOYEE UNDRESSED IN THE ABG LAB IN FRONT OF AN OPEN WINDOW AND IN VIEW OF 2 CO-WORKERS. THIS IS NOT ACCEPTABLE BEHAVIOR AS MENTIONED

IN THE EMPLOYEE HANDBOOK ON PAGE 5.

II. You were counseled about this on... DATE

[blank] and DATE [blank]

EMPLOYEE WAS PRESENT BUT REFUSED TO SIGN,

-STATING THAT SHE WANTED TO ADD HER

OWN COMMENTS.

III. You are hereby REPRIMANDED.

[s] Gene Karpowicz

[s] Donald J. Vibbert

Date 2/13/87

Ms. Marie E. Cully

6917 Detroit #2

Cleveland, Ohio 44102-3051

Mrs. Mary Spooner, DON

St. Augustine Manor

7800 Detroit Avenue

Cleveland, Ohio 44102

September 12, 1989

Dear Mrs. Spooner:

On September 8, 1989 at approximately 7:10 am, Thom Dagg presented me with two "Employee Performance Reports," copies of which are attached, and told me that I had to write any response to them prior to beginning work that day. He said I could not write a response on my own time. Since he has not been doing any

therapist procedures recently, my work load is considerably heavier and I don't believe I will have an opportunity to write a response during my work hours. I did not have an opportunity to fully respond September 8, since I had to complete the 8 am medication treatments by 9 am, and that is a very time-intensive assignment. I would not have time to respond on the unpaid half-hour I'm allotted for lunch either, since the workload requires that I work through my lunch break.

Nevertheless, I believe I should fully respond in order to make an attempt to correct Thom's misrepresentations for my employee record. This letter is an attempt to make a full response.

One of the Employee Performance Report concerned what was construed as performance of

work-related duties while off the clock. The incident described was incompletely related in a way to cover Thom's mistake and to make me appear at fault. On September 6 when I cam e to the Respiratory office to report to the 3-11 shift, I found two patient assessment forms on the table, one with a note directing me to do it "today," and the other with a note directing me to do it "by tomorrow." It was the first time I had seen these two patient assessment forms. As I was giving report Thom hurriedly entered the office and I told him I would punch out and do the assessments. I thought this would meet with his approval since he had previously told me I would have to use my own time to watch a video tape of a ventilator inservice. However, Thom told me then to do them "tomorrow," then hurriedly left the office. After report, I realized

that the day he had directed the work to be done was my day off, and I thought then that it was reasonable to do the assessments after punching out. I discovered one patient had died and I did the assessment on the

other patient. Thom had not previously directed me to stop working as soon as I punched, out, and only specifically directed that the first time on September 8, 1989. While Thom was on his 3½ week Leave of Absence, I did assessments after punching out and I told Doris Entwhistle, who was then Assistant Director of Nursing, that I was punched out when she saw me doing them. Doris Entwhistle did not tell me to stop working or to punch in.

I have serious professional concerns about these two Employee Performance Reports and certain circumstances relating to them. As I stated, Thom has recently stopped doing any therapist work and insisted that I do it all. Although some of the trach care has been

delegated to other shifts, tid and q6° treatments are still done twice by day shift. Since day shift sets up most of eh new oxygens (including admissions, which have been recently required without any advance notice to place equipment) and new treatments, and changes in orders, day shift is still the busiest shift. With nine trach patients and an additional ventilator patient, I have been busy to the point of not being able to take a break or lunch. Regardless of this work load, I have had calls for unnecessary assessments and been called for a patient in alleged dyspnea who was wheeling around her room watering her plants.

This increase in workload has come at about the same time the ventilator patient was accepted. Partly due to my lack of time and partly due to Thom's evasiveness, it had been

very difficult for me to acquire information regarding this new patient or her ventilator, a model I have never before had hands-on experience with. When I told Thom I believed it was inappropriate to accept the patient without having the user's manual available for the therapists before the patient's arrival, Thom told me that there was nothing he could have done about it. If that is true, something should be done about it before another unfamiliar machine is put in use, and therapists should be given the opportunity to become thoroughly oriented to this machine, using the back up machine in the Respiratory office with a "test lung," an inexpensive balloon like device which Thom states is "requisitioned."

I believe that my increased workload and lack of opportunity to orient to this ventilator are

meant to direct my time and attention away from this ventilator so that I can be blamed for anything that goes wrong with it. Other things Thom has done support this conclusion. Thom has stated that the ventilator policy is being developed; however I don't believe I will receive a copy or be shown the policy when it is developed. Other procedures Thom has written were not directed to my attention when completed. I also noted that 2nd floor now has a notebook concerning respiratory care services that is not part of the St. Augustine Manor Policy and Procedure Manual, and contains information I had not seen and did not see when I discovered the respiratory procedures in the Policy and Procedure Manual. Since the manual is loose leaf and doesn't have consecutive page numbers throughout, it is difficult to know whether a

written procedure is part of the manual or not, however, last week Thom told me to disregard written procedures, even

when I had acknowledged receipt of them; if they are not in the Policy and Procedure Manual. Last week Respiratory was paged for the ventilator patient and Thom arrived first. When I arrived Thom directed me away, stating that he knew I was busy. I later saw that he noted that he found the volume and rate on the machine to be different from what were ordered. I did not change those settings when I checked the machine earlier. Thom said nothing to me about the discrepancy in settings and made his note on the back of the ventilator check sheet, so that I saw the note only by chance. Thom recently had me sign a statement saying the treatments and oxygens are a priority, making no mention of ventilators. He told me I could not start 8 am

treatments until I signed the statement. That statement would imply that I believed treatments and oxygens had priority over the ventilator. I think that the lower priority of the ventilator is professionally incorrect, but I think that Thom wishes to hold me to the written statement; that is, to hold me to a professionally incorrect policy.

I am not only concerned that I am being singled out for criticism and unfairly and falsely evaluated, but that the constraints put on my time and on my access to information may affect patient care. I believe that the constraints are placed because Thom is seeking to fire me in retaliation for my lawsuit against St. Alexis, but whatever his motive, a breach of patient care could result from his actions.

I do not think I can believe what Thom tells me. A nurse on 5th floor recently told me that

Thom told her to give a breathing treatment when Thom and I were both present at work. Thom flatly denied this. Because of the nature of the nurse's comment and Thom's denial, I can only conclude that one of them is lying; and I believe that person is Thom. I am concerned that his attitude is represented on the button he brings to work and leaves in the office which says "i don't like your negative attitude, a--hole."

As I have writted before, it possible to assign me so much work that I cannot complete it in a 8-hour shift. I think this has been done. It is also possible to lock me out of the office so that I cannot be present at 7am and this has been done. I have also had no time card with which to punch in. When Mrs. Haggerty noted my presence at work at 6:58 am and I told her that Thom said Sept. 8 that he considers 7 am

late because I am to be in the office at 7 am, Mrs. Haggerty said "That's between you and Thom," and my time card was marked 7am on Sept 10 my Mrs. Haggerty or by Arlene Haley.

I appreciate your attention to this letter. I would request that it be placed in my employee file.

Sincerely,

{s} Marie E. Cully

SAINT AUGUSTINE MANOR

Cleveland, Ohio

EMPLOYEE PERFORMANCE REPORT

The following matters were discussed by and between Marie and myself Thom Dagg RRT, Respiratory Supervisor,

On 9/6/89 I assigned 2 Assessment to Marie. One was to be done on the sixth and the other on the seventh. At the end of her shift she informed me that "I didn't have time to do these, but I'll punch out and then go do them." I told Marie, "Don't worry about it, you can do them tomorrow." After I left I found out that 9/7 was Marie's day off so she went and assessed a patient in 201-1 off the clock after I specifically told her not to.

Problem: Performance of work related duties while off the clock.

Recommendation:

1) Marie will not perform job related duties after her specific shift has ended and she has punched out.

2) Marie will use appropriate judgement to organize her work assignment during her scheduled work day.

3. Marie will be aware that work assigned to her that is not completed will be either:

a. Reported to the on comming shift

b. Completed by Marie during her next scheduled shift

4) It is expected that work assignments will be completed in a timely mannor, and that

chronic incompletion of assignment will result in appropriate diciplinary action.

9/8/89 7:30 a

Tom did not give me an opportunity to coherently reply to these. He told me writing these took "a couple of hours." Patient treatments are pressing at this time. Tom's report is incorrect and he refuses to change it.

I acknowledge that these matters were discussed and explained to me. I ~~agree to correct and improve my working habits and/or personal behavior or appearance immediately.~~

Date 9/8/89 7:30 a

[s] Marie E. Cully

Employee's signature

Date 9/8/89

[s] Thomas F. Dagg

Department Head/Supervisor's Signature

SAINT AUGUSTINE MANOR

Cleveland, Ohio

EMPLOYEE PERFORMANCE REPORT

The following matters were discussed by and between Marie Cully and myself Thom Dagg RRT, Resp. Supervisor :

Problem: Repeated tardiness and unauthorized overtime.

Three pay periods survayed. Aug 12, Aug 26, Sept. 9 1989

8/2/89	Tardy-Unauthorized overtime
8/3/89	Unauthorized overtime
8/5/89	Tardy-Unauthorized overtime
8/6/89	Unauthorized overtime
8/7/89	Tardy
8/10/89	Tardy

8/11/89 Tardy

8/14/89 Unauthorized overtime-Early punch in and late punch out.

8/22/89 Tardy-Unauthorized overtime

8/23/89 Tardy

8/25/89 Tardy

8/27/89 Tardy

8/28/89 Tardy

8/31/89 Failure to punch out at the end of shift.

9/6/89 Tardy-Unauthorized overtime

Recommendations:

1) It is expected that Marie will punch in no earlier than 7 minutes before her shift and no more than 7 minutes after her shift.

2) It is expected that Marie be in her chair and ready for report promptly a 7:00 AM.

3) It is expected that Marie complete

her assignment in the 8 hour period and is in the respiratory office at three to give report to the on comming shift.

4) It is expected that Marie will punch in and out in accordance with policy.

9/8/89 7:33 A

Tom did not give me an opportunity to coherently reply to these. He told me writing these took "a couple hours." Patient treatments are pressing at this time. The problem presently is largely falsely written by Tom

I acknowledge that these matters were discussed and explained to me. I agree to correct and improve my working habits and/or personal behavior or appearance immediately.

Date 9/8/89 7:35 A

[s]Marie E. Cully

Employee's Signature

Date 9/8/89

[s] Thomas F. Dagg RRT

Department Head/Supervisor's Signature

PS Form 3811-A, Dec 1985

Request for Return Receipt (after mailing)

Mailing Date 9-12-89

Certified No. 975873646

Article Addressed to Mary Spooner DON

St. Augustine Manor 7800 Detroit Ave 44102

Postal Records Show Delivery

To: Signature Illegible

Date of Delivery: 9-19-89

Clerk's Initials foc

Postmark Cleveland, Ohio Oct 25 1989

P 875 873 646

Receipt for Certified Mail

Sent to Mrs. Mary Spooner DON

St Augustine Manor

7800 Detroit Ave

Cleveland, OH 44102

Postage .45

Postmark Sep 12 1989

Certified Fee .85

Return Receipt Showing to Whom and Date

Delivered .90

Total Postage and Fees 2.20

Ms Marie E. Cully

6917 Detroit #2

Cleveland, Ohio 44102

Dr. Joan Mallik

Director of Nursing

St. Augustine Manor

7800 Detroit Avenue

Cleveland, Ohio 44102

February 20, 1992

Dear Dr. Mallik:

This is a request to have copies of all documentation relating to Thom Dagg's special evaluation of me made February 19,1 992. I need that information to make an intelligent reply to the evaluation, so that I can sign it. I am also requesting a copy of the employee performance

report as presented to me February 19, 1992, with a copy of the communication clipped to it, which Thom Dagg first showed me February 19, 1992, and which I signed the same day. I would like that copy as I signed it. I would also like to have a copy of my new job description, as I signed it February 14, 1992, and which was first shown me February 14, 1992.

Thom Dagg wrote three dates on the February 19, 1992 evaluation: 11 July 91, 8 November 91 and 26 December 1991. He verbally stated that those dates referred to three write-ups; one alleging that I interrupted nursing care, one alleging discourtesy to an aide named Denise, and one written by you informing me that I was required to ask a family to leave a patient's room in order to request assistance form the nursing staff in manually ventilating the

patient. I need to be able to specifically identify copies of the write-ups referred to, and to have any documentation that relates to it.

Thom Dagg noted on the evaluation that he attached a copy of my job description. He wrote comments concerning my work on that job description critical of my assessments of patients. When asked, he said that referred to incidents of (he stated) my responding to requests for assessment by nurses with flippant remarks and not performing requested assessments. I know of no such occurrences. Thom Dagg could not tell me of any such occurrences. I have not previously been told of such occurrences, but if there is any evidence, I need to see it now.

The only other item Thom Dagg told me on February 19, 1992 i support of his poor

evaluation written on the job description of my assessments involves Catherine Scheel. Thom wants her tracheostomy cuff to be only partially inflated so that over half of her tidal volume set on the ventilator leaks out without ventilating her. I have complied with Thom directive regarding this once he made it clear that is what he wants, but I continue to feel

that this presents a dangerous situation. When the patient became dyspneic with the cuff inflated this way, I manually ventilated her and suggested to nursing she be transferred to a hospital. Thom was then called by nursing, and he told nursing he did not want the patient transferred to a hospital. Nursing and I followed Thom directions and the patient improved, but I continue to believe there is a risk when the patient deteriorates. The patient had had a large portion of her right lung removed fairly recently, but there is no diagnosis of cancer on the chart. Thom Dagg states he does not have any documentation regarding his criticism of my assessment of this patient. If there is any, I need to see it now.

I also need to ask you whether I am allowed to sit with my feet up and shoes removed in the office on my break or when charting. Thom Dagg has implied that I am not allowed to do this, although I have told that him that varying my posture this way and allowing my toes to be flexed alleviates my chronic sciatic pain secondary to a laminectomy and herniated disc. I sometimes find my pain level limits me at work, and I need to know if I am allowed to sit in this manner which relieves it.

Yesterday February 19, 1992, Laurie Palmer and Thom Dagg incorrectly stated that I had been given an opportunity to sign my evaluation of that date but did not. I wished to sign it after I had a chance to explain my disagreement as required by the form. In order to do that, I need to have copies identified as the specific write-ups

referred to, and any related documentation. Additionally, I was unable to sign due to the duress of not taking a complete lunch break (only 15 minutes), not having an afternoon or evening break, Thom's keeping me in meeting with him and Laurie Palmer, and assessment and completion of O_2 initiation according to Thom;s new directions I first saw yesterday. I had not charted prior to the first meeting, and had to stay late to finish charting. At the time Laurie Palmer said I refused to sign the evaluation (this is not correct) I had to begin medicated aerosol treatments for our patients. Thom did not offer to help me with this work.

The negative performance evaluation dated 2-19-92 was made in retaliation for my equal employment and civil rights actions against St. Alexis Hospital and others and to wrongly deny

my rights to St. Augustine Manor's pension plan. I will become fully vested in that plan in June 1992. It is worth noting that Thom Dagg's "employee performance report," first shown to me yesterday regarded something that happened 1/31/92 and related to a communication dated 11/8/91. Instead of relating his concerns to me in a clear and timely fashion, Thom waited until 2-29-92 to show me the performance report with its written verbal warning. His timing shows his retaliatory intent, as does

his misinformation. I am taking time today to write this which I need to spend on pressing legal matters in my civil rights actions. This delay to my pursuit of my civil rights was clearly an intent of yesterday's negative performance evaluation recommending probation.

On February 14, 1992, Thom Dagg criticized me for my assessment of Walter Kopec and my asking the nurse to ask the doctor, if in light of the patient's IPPB or aerosol (not clear fromt he transfer papers), the patient should have IPPB. Thom sarcastically said I should make that decision myself and asked me if I wanted to patient to have propylene glycol "which put him in the hospital last time." I believe Thom wanted me to suggest mucomyst for the patient.

Mucomyst was indicated on the transferred records to be ineffective for the patient. I might not believe this if that were the only time Thom has tried to mislead me, but it certainly is not.

A memo was posted 2-19-92 headed as referring to verbal/telephone orders. When I asked Thom why it did not deal with that topic I discovered a new policy allowing respiratory to take verbal orders had been inserted into the policy and procedure book. When I told Thom that I would like to know when new policies are made, he replied, "You and the whole rest of the Manor."

Thank you so much for taking time with this. I will hope to obtain the copies of the documentation soon, so that I can respond to and sign my evaluation.

Sincerely,

{s} Marie E. Cully

Xc: David Martin, Executive Director; Laurie Palmer

Addressee to Addressee Express Mail Next Day

Service HB 138119069US

to: Dt. Joan Mallik DON

St. Augustine Manor

1800 Detroit

Cleveland, OH 44102

PS Form 32811, November 1990 Domestic Return

Receipt

Article Addressed to:

Dr. Joan Mallik, DON

St. Augustine Manor

7800 Detroit

Cleveland, OH 44102

Article number HB 138119069

Date of Delivery 21 Feb 92

Signature [s] Ramona Rosa

Ms Marie E. Cully

6917 Detroit #2

Cleveland, Ohio 44102

Dr. Joan Mallik

Director of Nursing

St. Augustine Manor

7800 Detroit #2

Cleveland, OH 44102

February 27, 1992

Dear Dr. Mallik:

This is in response to your letter dated February 24, 1992, which I received yesterday. I believe I should clarify several points. Although the first page of the letter was written on grey St. Augustine Manor stationery, the second page with your signature was written on plain white

Xerox paper. This may be important in identifying the letter.

You state you know I have been touch with Thom Dagg and Laurie Palmer regarding my February 19, 1992 evaluation. The only contact I had with them regarding that evaluation since February 19, 1992 was by a xeroxed copy of my letter to you dated February 20, 1992. I simply have not had time during my busy workdays or time available during my time off from work.

I was not given access to my entire personnel file on February 19, 1992, nor have I been. On February 19, 1992, Laurie Palmer said she would not take time to review the entire file, and that she continued to lack documents referring to the dates noted on the evaluation dated February 19, 1992. I have made written requests for documents promised by Thom Dagg

and Laurie Palmer without success, in my letter to you dated July 17, 1991, and referred by letter to Laurie Palmer and in my letter dated December 27, 1992 to Laurie Palmer. Consequently, I have no idea what improvement in assessment skills or other areas is required by the performance evaluation. I believe St. Augustine Manor is dissatisfied that my assessment skills are good, and therfore do not present a good pretext to fire me in retaliation for my civil rights complaints. Unfortunately, I cannot assist that retaliation.

Regarding Catherine Scheel, I continue to believe there is a risk in allowing approximately half of her machine set tidal volume to leak out around her partially infloted cuff. We have no way to be certain she will not be under or over ventilated that way. If she is underventilated, we

may see her pH drop to 7.1 as it did November 8, 1991, putting her in imminent danger of death. If her family has legal power to decide she will not be transferred to a hospital, and her cuff is not to be inflated, we should have appropriate doctor's orders and a care plan for ventilatory failure with her cuff leak make available to all her caregivers. I am not clear what your letter dater February 24, 1992 means, since after November 8, 1991, when Catherine Scheel was transferred to a hospital, she was readmitted to St. Augustine Manor and then later again transferred to a hospital.

You suggest in you letter that I obtain a "medical slip." While I have

not seen my employee medical records, and do

not waive the privilege protecting them, I can tell you that Dr. Sandovaal, as Medical Director, has certified my ability to do my job, as required by the regular policy of St. Augustine Manor.

You also refer to a grievance procedure. I cannot properly from a grievance without knowing what specific criticisms are made. Until I have the documents containing that information, I cannot file a grievance. I also do not believe that my civil rights may be waived by the grievance procedure. Laurie Palmer told me that she only reviews EEOC complaints as SAM's EEOC officer, after a final decision is made in a grievance. I do not think such a review is adequate to preserve civil rights.

I did not wish to put off pressing legal matters to write this, but I believe I must attempt to clarify that I do not have my records, since

your letter gave the mistaken impression I had seen them.

I will hope to obtain my complete records soon, so that we need not devote precious time to further correspondence. I do thank you for your attention to this.

Sincerely,

[s] Marie E. Cully

Express US mail FB43093808X

xc: Mr. Martin

Laurie Palmer

PS Form 3811, Apr 1989 Domestic Return Receipt

Article Addressed to:

Dr. Joan Mallik

Director of Nursing

St. Augustine Manor

7800 Detroit Avenue

Cleveland OH 44102

Article Number FB3093808X

Signature- Agent Bonnie Naglez

Date of Delivery: 28 Feb 92

This exhibit a copy of Exhibit 8, Pg 1 of 1, with the following handwritten note:

Dear Mr. Martin,

Please review this letter as soon as possible.

Pleas also read your copy of my last letter to Dr. Mallick in its entirety. It concerns a dangerous patient situation which persists after my alerting Dr. Mallick to it

Marie E. Cully

Pages 3-6,9,11, & 12 omitted from this Appendix

Ms. Marie E. Cully

6917 Detroit #2

Cleveland, OH 44102

Dr. Joan Mallik

Director of Nursing

St. Augustine Manor

18 Detroit

Cleveland OH 44102

March 5, 1992

Dear Dr. Mallik:

I am writing about Thomas Dagg's changing the respiratory department schedule in order to allow him and Shirley White to attend a meeting while a new respiratory employee needs to be oriented and his decision to assign me supervisory duties without telling me what they

specifically are and when he has put me on probation, citing my alleged deficient assessment shkills, and when I have had no training or experience in evaluating an orientee's abilities.

On February 19, 1992, Thom told me that my new duty to act as supervisor in his absence would consist of carrying the beeper and answering questions from nurses and respiratory limited permit holders, with no other responsibilities. On March 4, 1992, Thom handed me the attached memo stating that I will be responsible for orienting a new employee without any other respiratory employee scheduled to assist with the workload, to take "emergency calls," and to "make the necessary calls to staff in the event of a call off."

Thom said that in orienting the employee, I am to "check off" her performance of tasks or

accept that Billie Joe Eisenmann, who states she is not licensed, has done so. I believe it is important that Thomas Dagg personally evaluate an orientee's task performance. I can't do that by "checking off" an orientee when I never know what Thom's expectaticns are, what the correct policies are, and when Thom is so critical of my judgment he has had me placed on probation as a preliminary to being fired. I cannot even know whether the new employee is a "limited permit holder" or a licensed "respiratory care professional" because Thom says our facility doesn't need to follow the rule of the Ohio Respiratory Care Board that requires those designations to be worn or incorporated into an institutional nametag (I do not believe hm). Thom gave me a check off orientationlist, saying I wasn't to follow it as written, and copying it on

the back of a patient's record showing the patient's HIV status. I am enclosing the copy he gave me. I pointed out to Thom that when he orients a new employee, he has another employee take some or all of the daily workload and orient the new employee. Thom's reply was "You're just going to have to make do."

I do not have any supervisory experience or training to evaluate

Pages 3-6,9,11, & 12 omitted from this Appendix

the new employee's competence in performing tasts and need some traiing or orientation to such supervisory work. I believe that the employee's orientation of Thom's and Shirley's out of town metting should be postponed to forestall a danger to patients and possible violations of law.

Thom gave me so many conflicting interpretations of what I am to do in taking "emergency calls," that I have no idea what he wants me to do. When I repeatedly tried ot clarify whether or not I would have to come in in response to calls he told me "Goodbye." I need to know what my specific responsibilites are.

Two of Thom's directions to me need to

be noted her in writign since they were given only verbally. (1) I told Thom that I regualarly swimon doctor's orders to do so (and I cannot swim on Dunday, and did not agree to the schedule change making me take that day off). Thom told me that when I am carrying the beeper, I should call St. Augustine prior to swminning and tell them I will be unavailable for a tiem. (2) Thom told me that if there is a call off, I am to call the people on the "phone List" in his memo attached to see if any will cover, if not, I am to tell nursing to cover. The written policy does not provide for those phone calls to be made, and I do not usually call my co-workers since I do not wish to recieve their crnak calls at my home. (I have made a complaint about this which Mr. Martin ordered destroyed.)

Although this month's schedule was

ostensibly revised 2-24-92, no changes occurred prior to 3/1/92, and the revised schedule was posted 2/28-92. The reason for all of Thom's recent actions is clear from my motion, a copy of which is attached, filed 2/24/92, seeking an extension of time until March 13, 1992 to file a status report in federal court. Only after the motion was filed was the schedule changed for an "out of town conference," so that I may be interrupted and prevented from going to federal court by vaguely defined supervisory duties I have no skill in or directions for performing. IF I had had notice I would be carrying the beeper next week, I could have asked for a larger extension of time, the first extension being almost automatically granted. I would suggest that all records concerning application for and attendance at the conference be carefully

reserved.

I need clarity regarding the competence and licensure status of people I am to supervise, and regarding how I am to supervise before I can safely do so. I hope this matter will be resolved, and that you, Thom and St. Augustine Manor will not require me to take any more time away from the little bit of unscheduled time I have to prepare papers for Federal Court. If the St. Augustine Manor cannot at a minimum require respiratory personnel to wear identification according to the rules of the Ohio Respiratory Care Board, I will have to notify the Board.

Thank you again for your attention.

Sincerely

{s} Marie E. Cully

via USExpress Mail GB 161187873
xc: Thomas Dagg
Mr. David Martin, Executive Director

Pages 3-6,9,11, & 12 omitted from this Appendix

FILED

1992 Feb 24 PM 3:46

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF OHIO

EASTERN DIVISION

MARIE E. CULLY, Plaintiff,

v.

GRACE HOSPITAL, et al., Defendants.

1:88CV1162

JUDGE GEORGE W. WHITE

(Magistrate Jack B. Streepy)

PLAINTIFF'S MOTION FOR AN EXTENSION OF TIME TO FILE STATUS REPORT

Plaintiff, reiterating her Motion and Objections to proceeding before a Magistrate,

respectfully moves for an extension of time until March 13, 1992 in which to file the status report required by order filed February 13, 1992 in this case; on the ground of extenuating circumstances, as detailed in the attached affidavit.

Respectfully submitted,

[s] Marie E. Cully

MARIE E. CULLY
6917 Detroit #2
Cleveland, Ohio 44102
(216) 651-8637
Plaintiff Pro Se

Pages 3-6,9,11, & 12 omitted from this Appendix

STATE OF OHIO)
) SS: AFFIDAVIT
COUNTY OF CUYAHOGA)

Affiant, being first duly sworn, deposes and states the following:

1. I, Marie E. Cully am Plaintiff Pro Se in case no. 1:88CV1162 pending in United States District Court, Northern District of Ohio, Eastern Division. This affidavit is prepared in support of my Plaintiff's Motion for an Extension of Time to File Status Report in that case.

2. I am a layperson at law. My only formal training in law has been a one term course in business law at Cuyahoga Community College and a one term course in Westlaw research.

3. I work full time in a nursing home in order to

support myself.

4. I work full time in a nursing home in order to support myself.

4. I have been experiencing sciatic pain and muscle cramps which are related to my previous laminectomy for a herniated intervertebral disc.

5. Last week I had to stay late at work to complete paperwork and also had to do approximately three hours of paperwork at home related to my job.

6. Last week I spent about seven hours of work, including seeking to have a preemptive writ ordering completion of a municipal court record in order to have the record transmitted to the Ohio Court of Appeals, in my eviction case.

7. Because of the above-described limitations, I believe I will not be able to file the status report required by an Order in the case cited at 1. by

the February 28, 1992 deadline.

FURTHER AFFIANT SAYETH NAUGHT.

/s/ Marie E. Cully

Sworn to and Subscribed before me this 24th day of February 1992

/s/ Jerry Gluck

Notary Public

Pages 3-6,9,11, & 12 omitted from this Appendix

DOMESTIC RETURN RECEIPT

Article Number: HB13812336X

Article Addressed to: Dr. Joan Mallik

Director of Nursing

St. Augustine Manor

7800 Detroit

Cleveland, Ohio 44102

Signature of Addressee: Ramona Rosa

Date of Delivery 3/6/92

DOMESTIC RETURN RECEIPT

Article Number HB 138123370

Article Addressed to

Mr. David Martin

Executive Director

St. Augustine Manor

7800 Detroit

Cleveland, Ohio 44102

Signature-Addressee

Ramona Rosa

Date of Delivery 3/6/92

PS Form 3806 /receipt for Registered Mail

Postmark of Cleveland, OH Public Square Sta Nov

30 1987

Registered No. R434 041 701

From Ms. Marie E. Cully

1384 West 83 rd Street 7

Cleveland, Ohio 44102

To: Equal Employment Opportunity Comm

1375 Euclid Avenue

Cleveland, Ohio 44115

PS Form 3811, Feb 1986

DOMESTIC RETURN RECEIPT

Registered No. R434 041 701

Addressee Address:

1375 Euclid Ave

Suite 600

Cleveland OH 44115

Signature: P. Kleisch

Date of Delivery 12-1-87

STATE OF OHIO)
) SS: AFFIDAVIT OF DISCRIMINATION
COUNTY OF CUYAHOGA)

Affiant, being duly sworn, deposes and states the following:

1. I was employed by St. Alexis Hospital, 5163 Broadway, Cleveland, Ohio 44127, Telephone 216/641-3300 from June 16, 1986 until June 22, 1987. I am a female citizen of the United States. My social security number is 296-40-5593. My address is 1384 West 83rd Street #7, Cleveland, Ohio 44102.

2. While I was employed by St. Alexis Hospital, during November 1986, I was subjected to sexual harassment by a doctor employed by St. Alexis Hospital's Emergency Room. The doctor involved wrote an incomplete account of his harassment in a letter to Annette Bendes, a

personnel officer at St. Alexis Hospital.

3. After November 1986, I was harassed by various employees of St. Alexis Hospital.

4. On February 13, 1987, Donald Vibbert, my supervisor at St. Alexis Hospital, reprimanded me without warning for changing shirts in the blood gas lab. His written statement stated that I "...undressed in front of an open window and in view of 2 coworkers." According to St. Alexis Hospital's Employee Handbook, a reprimand without warning is given for more serious offenses, including sexual misconduct.

5. On February 17, 1987. Annette Bendes told me that because of the events described in this affidavit at 2. and 4., she believed I had a sexual problem and that I should seek treatment for it. She also stated she could alternatively fire me.

6. On and after February 17, 1987, various employees continued to harass me in an intensified manner, including deliberately misdirecting me to perform procedures on the wrong patient, and to perform an arterial puncture on a patient that had already been performed.

7. On March 7, 1987, Ihor Kwit, a coworker at St. Alexis Hospital, who had previously forcefully pushed me, refused to cooperate in locating an oxygen tank; when a nurse, Theresa Grabski, in charge of a floor at St. Alexis insisted that I produce the tank, which was, unknown to me, stored on her floor. The nurse accused me of willful lack of cooperation and as a result I cried loudly in an employee rest room which was accessed only through an employee lounge.

8. As a result of my crying on March 7,

1987, I was told without warning or a chance to read and respond to Theresa Grabski's incident report that St. Alexis Hospital required me to take a ninety day Leave of Absence, and that St. Alexis Hospital would not hold my job for me to return to.

9. On June 6, 1987, I sent a statement written by a physician that i was able to return to work to St. Alexis Hospital, as had been required by St. Alexis Hospital.

10. On June 22, 1987, St. Alexis Hospital fired me.

11. The above described adverse actions in points 3 through 10 were

taken by St. Alexis Hospital in retaliation for my complaint of sexual harassment at St. Alexis Hospital and for the following charges of discrimination, which I was actively pursuing in district court and the court of Appeals during the time of retaliation by St. alexis Hospital : eeoc charge numbers 052830507, 052842090, and 052860715.

12. I am currently employed in a nursing home and regularly scheduled to work from 11:00 pm to 7:00 am. Because of my work schedule, it is very inconvenient for me to file a charge of discrimination by appearing in person at an EEOC office. I thefore present the foregoing affidavit of discrimination by mail mailed November 30, 1987 by United States mail

to the Equal Employment Opportunity Commission, 1375 Euclid Avenue, Cleveland, Ohio 44113, in order to file the foregoing allegations as a charge of discrimination with the Equal Employment Opportunity Commission.

FURTHER AFFIANT SAYETH NAUGHT.

[s] Marie E. Cully

SWORN TO AND SUBSCRIBED BEFORE ME this 30 day of November, 1987. In Cuyahoga County State of Ohio.

[s] Kenneth C. Rose, Esq.

Notary Public

My commission has no expiration date ORC 143.07

Deposition of Plaintiff Pgs 15-16
(Exhibit B to St. Augustine's Motion for Summary Judgment)

.....A I think probably the basis of Tom's discrimination was sex.....He would, when he was working with me, reach in front of me. Say this pad was to my left. He'd come up on my right -- and I used to call it dive bombing my breasts, because he would take a minute to kind of scope out the situation and see how he could do it, you know, without being absolutely certain that he was just reaching out and grabbing. He had to have something that he was reaching for that was passed me. And he just, you know, come up on the other side and right passed over my breasts to reach whatever he could..

Q And how many times did that occur?

A. Oh, about 30 times, I think. I don't know.

Q And did you ever have any discussions

with him regarding that?

A. No. I was afraid he would fire me.

No. 95-1423

Supreme Court, U.S.
FILED
APR 4 1996
CLERK

In The

Supreme Court of the United States

October Term, 1995

MARIE E. CULLY,

Petitioner,

vs.

ST. AUGUSTINE MANOR, *et al.*,

Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Ohio

RESPONDENTS' BRIEF IN OPPOSITION

MARIE E. CULLY
Petitioner, Pro Se
2901 Archwood, #303
Cleveland, Ohio 44109
(216) 351-5287

WILLIAM A. VISCOMI
TODD M. HAEMMERLE
GALLAGHER, SHARP, FULTON
& NORMAN
Attorneys for Respondent
St. Alexis Hospital
1501 Euclid Avenue
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BETH A. SEBAUGH
Counsel of Record
NITA KAY SMITH
QUANDT, GIFFELS
& BUCK CO., L.P.A.
Attorneys for Respondents
St. Augustine Manor, St.
Augustine Manor Corporation,
Catholic Charities of Cleveland
and Catholic Diocese of Cleveland
800 The Leader Building
Cleveland, Ohio 44114
(216) 241-2025

8611
Lutz Appellate Services, inc.
(800) 3 APPEAL • (800) 5 APPEAL • (800) BRIEF 21

QUESTION PRESENTED

Whether a court properly enters summary judgment where a plaintiff fails to present a *prima facie* case of retaliatory discharge.

RULE 29.6 STATEMENT

Catholic Charities Corporation, erroneously named as Catholic Charities of Cleveland, has no parent corporation nor does it have any subsidiary which is not wholly-owned.

St. Augustine Manor, erroneously named as St. Augustine Manor Corp, is a wholly owned subsidiary of St. Augustine Corporation.

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Respondents, St. Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland, hereby oppose the Petition for a Writ of Certiorari filed by Marie E. Cully.

The petitioner argues not for defining or modifying the standard articulated for determining when and under what circumstances summary judgment is appropriate in an action brought pursuant to Title 42 U.S.C. § 2000 *et seq.* Rather, she merely posits that established law was improperly applied in her case.

Moreover, no special or important reasons exist for exercising this Court's judicial discretion to review this matter. To the contrary, accepting this case for certiorari review would serve only to squander this Court's limited time and resources.

RELEVANT STATUTES

While petitioner cites "28 USC §2000e 3(a)" and "28 USC 2000e5(f)", it appears clear that Ms. Cully intends to predicate her arguments on 42 U.S.C. § 2000, *et. seq.*

42 U.S.C. § 2000e-3(a) provides, in pertinent part:

> **(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings**
>
> It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified,

assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

STATEMENT OF THE CASE

Pursuant to Supreme Court Rule 15.2, these respondents provide the following clarifications and corrections to the petitioner's statement of the facts and law applicable thereto, which clarifications and corrections are supported by the evidence of record submitted in the trial court.

Respondents, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland, are both separate and distinguishable organizational entities. Neither has participated in the day-to-day business operations of any of the other respondents nor has either exercised any operational direction or control over those other respondents. Barring litigation, neither Catholic Charities of Cleveland nor the Catholic Diocese of Cleveland has had any contact or relationship with the petitioner, Marie E. Cully.

Respondent, St. Alexis Hospital, is also a separate and distinct organizational entity. No connection or interrelationship exists between St. Alexis Hospital and Catholic Charities of Cleveland, the Catholic Diocese of Cleveland, St. Augustine Manor and/or St. Augustine Manor Corporation.

St. Augustine Manor, is owned and operated by St. Augustine Manor Corporation (collectively referenced hereinafter as "St. Augustine"), and is engaged in the provision of health care services. On June 21, 1987, St. Augustine established an employment relationship with the petitioner, Marie E. Cully. Ms. Cully was retained as an employee-at-will, no oral or written contractual agreement having been made by

the parties to the effect either that she would be employed for any specific term or that her status at St. Augustine Manor was anything other than that of an at-will employee.

At the time St. Augustine administrators hired Marie E. Cully, they were aware of the series of lawsuits against her previous employers which Ms. Cully had asserted in the civil court system and of the numerous claims against those previous employers which she had pursued with the Equal Employment Opportunity Commission. St. Augustine made no comment on Ms. Cully's pending civil rights claims, took no position on the merits of her allegations, expended no efforts to follow the progression of those proceedings and had no interest in the outcome of those actions. At no time during the nearly five year employment period was retaliatory or harassing action taken by any individual acting on behalf of St. Augustine in recompense for Ms. Cully's assertion of her constitutional rights.

On April 29, 1992, Marie Cully's department supervisor, Thomas F. Dagg, reported a neglect of duty, policy or procedure and failure to maintain work standards on Ms. Cully's part. Because the April 29, 1992, offense was the latest in a string of Personnel Policy violations throughout the course of her employment, Marie E. Cully was terminated from St. Augustine Manor on that date.

Subsequently, Ms. Cully filed suit against St. Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland, The Catholic Diocese of Cleveland and St. Alexis Hospital, alleging 1) wrongful discharge; 2) retaliatory discharge; 3) sexual harassment and sexual discrimination; 4) intentional infliction of emotional distress; and 5) conspiracy. Saint Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland and The Catholic Diocese of Cleveland filed separate answers, denying each of the

petitioner's substantive allegations and asserting numerous available affirmative defenses.

Because the petitioner had predicated her claims against Catholic Charities of Cleveland and The Catholic Diocese of Cleveland on the mistaken assumption that these entities are "substantially identical to" or control St. Augustine Manor, those respondents filed separate Motions to Dismiss on the basis that at no time was Ms. Marie Cully ever employed by either entity nor did either of those organizations at any time exercise operational control over St. Augustine Manor. The trial court treated those Motions to Dismiss as Motions for Summary Judgment, granting both.

St. Augustine Manor and St. Augustine Manor Corporation filed a joint Motion for Summary Judgment on the basis that: 1) Marie E. Cully was an employee at-will, terminable at the discretion of St. Augustine Manor; 2) Marie E. Cully had failed to set forth a *prima facie* case for her alleged retaliatory discharge, sexual harassment or sexual discrimination, intentional infliction of emotional distress or conspiracy claims; and 3) Marie E. Cully's claims for sexual discrimination and sexual harassment were time-barred by the statute of limitations. The trial court determined to grant that Motion for Summary Judgment.

The petitioner appealed the trial court's decisions entering summary judgment in favor of Catholic Diocese of Cleveland, Catholic Charities of Cleveland, St. Augustine Manor Corporation and St. Augustine Manor. The matter having been briefed and orally argued, the Court of Appeals overruled each assignment of error raised by Ms. Cully, affirming summary judgment for all respondents. Petitioner appealed further to the Supreme Court of Ohio which declined to exercise jurisdiction.

Marie E. Cully now petitions for certiorari, for purposes of these respondents, asking this Court to evaluate whether her termination from St. Augustine was wrongful. While she cites "28 USC §2000e 3(a)" and "28 USC 2000e-5(f)", it appears clear that she intends to predicate her arguments on 42 U.S.C. § 2000, *et seq*. Regardless, none of these authorities provide any basis for reversal of the decisions below.

REASONS FOR DENYING THE WRIT

No unique factual circumstances are presented in this case, nor does the petitioner raise any novel legal arguments to alter the application of the unambiguous, controlling law which governed resolution of this matter in the courts below. As a matter of law, the trial court properly granted summary judgment in favor of St. Augustine Manor, St. Augustine Manor Corporation, Catholic Charities of Cleveland and the Catholic Diocese of Cleveland, which decisions were properly affirmed in the Court of Appeals.

While Marie E. Cully asserted numerous claims against these respondents in her Amended Complaint, she petitions this Court for certiorari review on the basis that summary judgment was improperly granted below on her wrongful/retaliatory discharge claims asserted pursuant to "Title VII", 42 U.S.C. § 2000e. However, as that law is drafted, interpreted and applied, the petitioner cannot establish any genuine issue of material fact with respect to her entitlement to recover thereunder.

I.

PETITIONER, MARIE E. CULLY, CANNOT ESTABLISH A *PRIMA FACIE* CASE FOR WRONGFUL OR RETALIATORY DISCHARGE.

Marie E. Cully alleges that she was placed on probation, suspended and later terminated for three retaliatory reasons: her pursuit of EEOC claims against three hospitals, none of which has any affiliation with any of these respondents; her complaints of sexual harassment vocalized to a St. Augustine Manor administrator long before the date of her discharge; and her criticism of racial discrimination allegedly perpetrated by respondent, St. Alexis Hospital, against its patients. Aside from the fact that her allegations defy logic, as a matter of law, the petitioner cannot establish a *prima facie* case to maintain a cause of action for wrongful or retaliatory discharge.

To establish a claim of retaliatory discharge under Title VII, petitioner Cully must show by a preponderance of the evidence that 1) she engaged in a protected activity as an employee, 2) she was subsequently discharged from employment, and 3) there existed a causal connection between the protected activity and the discharge. *See, e.g., Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9 (1st Cir. 1994). The petitioner cites no case law inconsistent with this authority.

Application of *Hochstadt v. Worcester Found. for Experimental Biology, Inc.*, the District Court case relied upon by Marie E. Cully, establishes that she has failed to set forth a *prima facie* case for retaliatory discharge. 425 F. Supp. 318 (D. Mass 1976). That decision stands for the proposition that, in order to establish a causal connection between an employee's participation in a protected activity and her subsequent discharge, that employee must show either evidence tending to

establish a retaliatory motivation on the part of her employer or that her discharge followed her participation in a protected activity within such period of time that the court might infer retaliatory motivation. The instant petitioner can show neither.

Marie E. Cully has produced no evidence of any retaliatory motivation on the part of any of these respondents. The petitioner's conclusory accusations lack the concrete documentation necessary to prove a causal link between protected activity and retaliatory treatment. As one court has stated:

> [e]ven in discriminatory discharge cases, where the plaintiff can rarely present direct, subjective evidence of an employer's actual motive, the plaintiff cannot survive summary judgment with "unsupported allegations and speculations," but rather must "point to specific facts detailed in affidavits and depositions — that is, names, dates, incidents, and supporting testimony — giving rise to an inference of discriminatory animus."

Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc., 31 F.3d 9 (1st Cir. 1994), citing *Lipsett v. University of Puerto Rico*, 864 F.2d 881 (1st Cir. 1988).

The protected activities in which the petitioner was engaged consisted of prosecution of administrative and legal civil rights claims against third party entities. None of these respondents has or had any interest in or affiliation with any of Ms. Cully's former employers, including respondent, St. Alexis Hospital. As a testament to these respondents' complete indifference to the petitioner's assertion of her constitutional rights against her

former employers, St. Augustine Manor hired her with full knowledge of these civil rights claims and retained her for nearly five years during which time she continued to pursue those actions.

Nor can Marie E. Cully establish that her discharge followed her protected activities within such period of time that the court might infer retaliatory motivation. The petitioner had initiated her protected activities prior to the time when she began working for St. Augustine Manor, which activities continued during the entire course of her tenure of employment. Given that St. Augustine Manor was aware of the petitioner's participation in protected activities for five years before it discharged her, no inference of retaliatory motivation may be drawn.

The petitioner posits that a causal "nexus" exists between her protected conduct and her termination because "her opposition to her previous firing persisted throughout her entire employment at St. Augustine." (Petition at p. 6). She further argues that, even if the causal connection is weak between her EEOC charge or suit against St. Alexis and her subsequent termination, the fact that she routinely complained of having been retaliated against by St. Augustine constituted a protected activity which occurred sufficiently close in time to her firing. Neither contention has merit.

Marie E. Cully argues that she was subjected to a "continuing course of discrimination", which had a "close time nexus to discharge". (Petition p. 10). As a factual matter, the record evidences no such "continuing course of discrimination".[1] Regardless, the petitioner's attempt to

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1. A comprehensive list of St. Augustine Manor's allegedly discriminatory conduct includes: assigning a workload impossible to complete within the required time, requiring her to work after "punching out"

(Cont'd)

establish the requisite causal connection by noting that her termination followed six weeks after her last internal complaint of alleged retaliation fails as a matter of law. Her own testimony establishes that she made numerous, repeated internal complaints of alleged retaliation, none of which previous internal complaints resulted in termination. Clearly, were St. Augustine Manor inclined to terminate Ms. Cully in retaliation for her prosecution of her constitutional rights, which rights she asserted forcefully and consistently during the course of her employment, it would have done so before five years had passed.

Marie E. Cully rejects this obvious reality, opining that:

> an employer can maximize the benefit of its retaliation if it can continue it throughout the administrative and judicial resolution of the protected activity. Particularly where the employee is a pro se lay person at law, this can effectively sap her time and energy so that she is diverted from her complaint.

(Cont'd)

and during her lunch break; delaying performance reviews, requiring her to work shifts which caused her transportation problems; exposing her to harmful chemicals; denying her access to an equipment operating manual; falsely accusing her of mental incapacity to work and later suspending her for that reason; encouraging her to take actions dangerous to the health and safety of patients; interfering with the receipt of mail at her residence; and threatening to require her to take action which could have resulted in the loss of her respiratory therapy license. She further alleges that one St. Augustine supervisor repeatedly made contact with her breasts, disparaged another employee and made derogatory reports of her work, which reports were kept on file by St. Augustine Manor. These respondents deny the veracity of each of these allegations. However, even assuming, *arguendo*, these alleged violations to have occurred, none evidences discriminatory conduct or any pattern of retaliation for Ms. Cully's prosecution of civil rights actions against third party entities.

(Petition p. 11.) Aside from the fact that her argument lacks any foundation in logic, it illustrates the Hobson's choice which she would present to these respondents; by the petitioner's reasoning, St. Augustine Manor was wrong to terminate her and wrong to retain her.

As the trial and appellate court opinions demonstrate, the petitioner's failure to present a *prima facie* case of retaliatory discharge was fatal to her case.

II.

THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT IN FAVOR OF THESE RESPONDENTS, WHICH DECISION THE COURT OF APPEALS PROPERLY AFFIRMED.

Summary judgment is appropriate when the evidence offered demonstrates that there is no genuine issue of material fact in dispute and no jury could reasonably find by a preponderance of the evidence that the non-moving party is entitled to judgment in its favor. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986). The moving party bears the burden of demonstrating a lack of a genuine issue of fact. If the nonmoving party fails to make a sufficient showing of an essential element of his or her case with respect to which he or she has the burden of proof, the moving party is entitled to judgment as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986).

These respondents concede that Marie E. Cully, in pursuing equal employment claims against her former employers, was engaged in a protected activity. These respondents also concede that Marie E. Cully was discharged from the employment of St. Augustine Manor. However, the petitioner has utterly failed to present sufficient evidence of a causal connection between her

protected activity and the discharge which followed it five years later. Outside of the self-serving accusations set forth in her Affidavit, the petitioner failed to present any evidence which would justify even a circumstantial inference that she was discharged for a retaliatory or discriminatory reason.

In arguing that her Affidavit, in which she negates St. Augustine's explanation for her termination, suffices to create a genuine issue of material fact, the petitioner misreads the very authority upon which she relies. *See Womack v. Munson*, 619 F.2d 1292 (8th Cir. 1980), *cert. denied*, 450 U.S. 979 (1981); *Hochstadt v. Worcester Found. for Experimental Biology, Inc.*, 425 F. Supp. 318 (D. Mass. 1976). Both of those authorities stand for the proposition that only after an employee establishes a *prima facie* case for retaliatory discharge does the burden of proof shift to the employer to advance a non-retaliatory motivation for its decision. Because Marie E. Cully failed to establish a causal connection between her participation in a protected activity and her discharge, these respondents never assumed the burden of proving the legitimacy of her discharge.

Moreover, "evidence contesting the factual underpinnings of the reasons for the [employment decision] proffered by the employer is insufficient, without more, to present a jury question." *Hoeppner v. Crotched Mountain Rehabilitation Ctr., Inc.*, 31 F.3d 9 (1st Cir. 1994), citing *Morgan v. Massachusetts Gen. Hosp.*, 901 F.2d 186, 194 (1st Cir. 1990). Cully cannot establish that St. Augustine's reasons for discharging her were merely a pretext for impermissible retaliation solely by contesting the objective veracity of the respondent's action. *Id.*

To defeat a motion for summary judgment, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty*

Lobby, Inc., 477 U.S. 242 (1986). As applied to the instant case, there is insufficient evidence from which a reasonable jury could find that St. Augustine terminated its employment relationship with Marie E. Cully for any impermissible reason.

Marie E. Cully having failed to establish a causal connection between her protected activity and her discharge, which causal connection constitutes an essential element of a Title VII cause of action, the trial court properly granted summary judgment in favor of these respondents, which decision was properly affirmed by the Court of Appeals.

III.

NO COMPELLING ISSUES COUNSEL FOR REVIEW OF THIS CASE.

The considerations governing review on writ of certiorari enumerated in Supreme Court Rule 10 establish that the instant case lacks the appropriate character to command this Court's review. The state courts below did not adjudicate the petitioner's federal claims inconsistently with any decision of another state court of last resort or of a United States court of appeals. Nor do the lower court decisions in any way conflict with any decision of this Court.

While the petitioner attempts to outline a conflict among federal Circuit Courts regarding whether, in the absence of proof of an employer's discriminatory motivation, the insufficiency of an employer's reason for termination can forestall summary judgment, no such conflict exists. (Petition pp. 13-14). Any inconsistency of outcome between *Rhodes v. Guiberson Oil Tools*, 39 F.3d 537 (5th Cir. 1994), *reh'g en banc granted*, 49 F.3d 127 (5th Cir. 1995), and *Barbour v. Merrill*, 48 F.3d 1270 (D.C. Cir. 1995), *cert. dismissed*, February 28, 1996, reflects simply

divergent fact patterns and divergent determinations with respect to whether the plaintiff had established a *prima facie* case under Title VII. In *Rhodes*, the court found no evidence or testimony which showed any connection between the plaintiff's age and the defendant's decision to terminate his employment. Therefore, summary judgment in favor of the defendant was entered. In *Barbour*, the plaintiff successfully set forth a *prima facie* case for racial discrimination. Therefore, summary judgment in favor of the defendant was denied. These cases evidence no conflict among the Circuit Courts relevant to the issues *sub judice*.

Moreover, the federal law at issue is clear. No ambiguity in statutory draftsmanship or judicial interpretation warrants intervention by this Court. The Petition submitted by Ms. Cully reveals that she argues not for defining or modifying the summary judgment standard utilized in the Title VII context. Rather, she merely posits that established law was applied improperly in her case. This Court has articulated the order and allocation of proof in Title VII suits. *See McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802-04 (1973); *Furnco Constr. Corp. v. Waters*, 438 U.S. 567 (1978); *Board of Trustees v. Sweeney*, 439 U.S. 24 (1978).

The instant case presents no unique factual circumstances which would justify clarifying or modifying the law which this Court has carefully crafted and faithfully followed.

CONCLUSION

As established above, the trial court property granted summary judgment in favor of these respondents, which decision was properly affirmed by the Court of Appeals. Moreover, resolution of this matter will have no immediate importance or significance beyond the particular facts of this case and the specific parties to it.

For these reasons, these respondents respectfully request that this Court deny the Petition for Writ of Certiorari submitted by Marie E. Cully.

Respectfully submitted,

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